134

Supreme Court, U.S.
FILED

09-112 MAY 1 2009

OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

ANGEL RUIZ RIVERA AND
INSTITUTO DE EDUCACION UNIVERSAL

PETITIONERS

V.

UNITED STATES DEPARTMENT OF EDUCATION

RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

PETITIONERS BRIEF

JULIO MORILLO LIMARDO, ESQ.
AVENIDA BETANCES I-17
HERMANAS DAVILA
BAYAMON, P.R. 00959.
787-485-5437

QUESTIONS PRESENTED

Whether the circuit court below erred by considering the district court's interlocutory order or procedural ruling which read: "This case is under appeal", as a final judgment and assuming jurisdiction over it instead of remanding for a final determination on the merits of the FRCP 60 (b) Motion?

Whether the courts below erred by allowing during more than five years Instituto de Educacion Universal (IEU)'s President, Co-Plaintiff Angel Ruiz Rivera to represent the corporation, against the stare decisis of this Court which forbids same?

Whether the courts below erred in not considering the overwhelming exonerating evidence, deliberately concealed by the U.S. Department of Education's legal counsels that prove that there was abuse of the legal process and fraud upon the courts de minimis?

Whether the courts below erred by condoning or acquiescing to the evidently obvious abuse of the legal process and fraud upon the courts committed by the respondent's counsels in this controversy which included egregiously having: (1) deliberately intimidated witnesses, (2) wantonly concealed exonerating evidence, (3) maliciously suborned perjury and (4) obstruction of justice?

Whether the courts below erred in leaving out of the appeal Co-Plaintiff Angel Ruiz Rivera, IEU's President, when he suffered personally the quintessential injury-in-fact when imputed Trust Fund Liabilities by the Internal Revenue Service (IRS) as the person responsible for IEU's tax debt?

Whether the courts below erred by deciding contrary to the overwhelming evidence proving without a doubt that: (1) the clock hour "finding" regulation was applied contrary to the express, specific and explicit proscription in the statute and the administrative case law; (2) the fraudulently imputed unpaid refunds had been paid; and (3) the excess cash "finding" was so deliberately inflated that it could not be reconciled neither mathematically nor accounting wise and was contradicted by audits from two independent auditors, especially when the Auditor In Charge (AIC) was expelled from the Office of the Inspector General (OIG) for his flaws in it?

LIST OF ALL THE PARTIES

The Petitioners are:
Instituto de Educacion Universal (IEU), a non-profit educational institution.

Angel Ruiz Rivera, IEU's President-Founder, who was Co-Plaintiff and Co-Appellant having appeared Pro Se and for IEU during many years until being ruled out.

The Respondent is the U.S. Department of Education (USDE).

CORPORATE DISCLOSURE STATEMENT

I Julio Morillo Limardo, Esq., appearing here for Petitioners, hereby certify that there is no parent corporation, or publicly held company owning 10% or more of the corporation's stock.

TABLE OF CONTENTS

1. Questions Presented.....iii

2. List of All the Parties.....v

3. Corporate Disclosure Statement.....v

4. Table of Contents.....vi

5. Table of Authorities.....vii

6. Citations and the Official and Unofficial Reports of the Opinions and Orders Entered in the case by the Courts.....1

7. Statement of the Basis for Jurisdiction.....2

8. The Constitutional Provisions, Treaties, Statutes, Ordinances and Regulations in the case.....2

9. Concise Statement of the Case.....3

10. Direct and Concise Argument 16

11. Summary of Argument.....26

12. Conclusion.....28

13. Appendix.....29

TABLE OF AUTHORITIES

CASES

AAL High Yield Bond Fund v. Banc of America Securities, 361 F.3d 1305 (11th Cir. 2004).....24

Alexander v. Robertson, 882 F.2d 421, 9th.Cir. (1989).....21

Aoude v. Mobil Oil, 892 F.2d 1115 (1st.Cir. 1989).....21

Butz v. Mendoza-Powers 474 F.3d 1193 (9th.Cir. 2007).....16

Cardoza v. Pacific States Steel Corporation, 320 F.3d 989 (9th Cir. 2003).....24

Castillo v. Cameron County, 238 F. 3d 325 (5th Cir. 2001).....24

Churchill Village v. General Electric, 361 F.3d 566 (9th Cir. 2004).....24

Connally v. General Construction, 269 U.S. 385, 391, (1926).....21

Devlin v. Scardeletti, 122 S.Ct. 2005 (2002).....25

Dixon v. Commissioner of Internal Revenue, 00-70858 (9th.Cir.2003).....21

Federal Deposit Insurance Corp. v. United Pacific Insurance Co., 152 F.3d 1266 (10th.Cir.1998).....22

Feliciano-Hill v. Principi, 439 F.3d 18.....23

Fobian v. Storage Technology, 164 F.3d 887 (4th. Cir. 1999).....22

Geo.P. Reintjes v. Riley Stoker, 71 F. 3d 44, (1st.Cir. 1995).....22

Gonzalez v. Crosby, 545 U.S. 524, 2005.....18

Goya Foods, Inc. v. Wallack Management Co., 290 F.3d 63 (1st.Cir.5/17/2002).....24

Grace v. Bank of Leumi, 04-5824 (2nd.Cir. 2006).....3,17
Hispanic Society of New York City Police v. New York City Police 806 F.2d 1147, (2nd.Cir. 1986).....24
In re Estate of Marcos Human Rights Litigation, 94 F.3d 539 (9th Cir. 1996).....24
In Re Lafata, MW05055, 1st.Cir. 2006.....22
In Re Osoborne, 379 F.3d 277 (5th.Cir. 2004).....17
In re Piper Funds, Institutional Government Income Portfolio Litigation, 71 F.3d 298, 301 (8th Cir. 1995).....24
In re Sealed Cases, 363 U.S. App. D.C. 214, 381 F.3d 1205 (D.C. Cir. 2004).....22
Info-Hold v. Sound Merchandising, 538 F.3d 448 (6th.Cir. 2008).....21
Kaplan v. Rand, 192 F.3d 60 (2d Cir. 1999).....24
Karaha Bodas Co. v. Perusahaan Pertambangan, 313 F.3d 70 (2d Cir. 2002)....24
Klapprott v. United States, 335 U.S. 601(1949).....22
Kupferman v. Consol. Research, 459 F.2d 1072, 2nd.Cir.(1972).....21
Kyles v. Whitley, 514 U.S. 419.....20
Lujan v. Defenders Wildlife, 112 S.Ct. 2130 (U.S.1992).....23
Manhattan General v. Commissioner, 297 U.S. 129.....19
Marsh v. Oregon Natural, 490 U.S. 360 (1979) 20

Microsystems Software, Inc. v. Scandinavia Online AB, 226 F.3d 35 (1st Cir. 2000).....24
Miller v. Marriott International, 300 F.3d 1061(9th.Cir.2002).....16
NLRB v. International Union, 460 F2d. 589, (5th.Cir. 1972) 19
Official Committee of Unsecured Creditors of WorldCom, Inc. v. Securities and Exchange Commission, 467 F.3d 73 (2d Cir. 2006).....24
Pearson v. First N.H. Mortgage, 200 F.3d. 30, 1st.Cir. (1999) 21
Pediatric Specialty Care v. Arkansas Department of Human Services, 364 F.3d 925, (8th.Cir. 2004).....24
Penn West Associates v. Cohen, 371 F.3d 118 (3rd. Cir. 2004).....16
Pioneer Inv. Serv. v. Brunswick Assocs. 507 U.S. 380, 385 (1995).....17
Plain v. Murphy Family Farms, 296 F.3d 975 (10th Cir. 07/16/2002).....24
Plaud v. Spendthrift Farm, 514 U.S. 211, 1995.....22
Rowland v. California Men's Colony, 113 S.Ct. 716 (1993).....3,17
Schreiber Foods v. Beatrice Cheese, 04-1279 (Fed.Cir. 2005).....21
Securities and Exchange Commission v. Forex Asset Management, 242 F.3d 325 (5th Cir. 2001).....24
Simon v. Navon, 116 F.3d 1 (1st.Cir.1997).....22
Smalls v. United States, 471 F.3d 186 (D.C.Cir. 2006).....4,17

Standard Oil Company v. United States (1976), 429 U.S. 17.....22

Torres v. Chater, 125 F.3d 166 (3rd.Cir.1997).....16

Ty v. Softbelly's, 353 F.3d 528 (7th.Cir.2003).....21

United States v. Alisal Water Corp., No. 02-15907 (9th Cir. 2005)..... 24

United States v. Parcel of Land, 928 F.2d 1, 1st.Cir.1991.....22

United States v. Kirschenbaum, 156 F.3d 784 (7th Cir. 1998).....24

Velez-Diaz v. Vega Irizarry, 421 F.3d 71 (1st.Cir. 9/2/2005).....24

Venture Industries v. Autoliv ASP, 457 F.3d 1322 (Fed.Cir. 2006).....22

ADMINISTRATIVE CASES

In The Matter Of Denver Paralegal Institute, 92-86-SP,92-87-SA.....5,19

In The Matter Of IEU, 96-28ST, 96-93-SP, 96-103-SA 19

In The Matter Of MBTI, 93-147-SA.....5,19

RULES AND REGULATIONS

Title 34 Code of Federal Regulations Education Section 600.2.....12

STATUTES

28 U.S.C. 1254.....2

28 U.S.C. 1331.....2

28 U.S.C. 1070 et seq..... 6

U.S. CONSTITUTION

First Amendment.....9
Fourth Amendment.....11
Fifth Amendment.....11
Sixth Amendment 9

CITATIONS AND THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THE CASE BY THE COURTS

U.S. Supreme Court Order of April 13, 2009 granting application for extension of time to file Petition.

First Circuit's Order of December 2, 2008 denying and striking motion for court to rule on rehearing filed by Co-Plaintiff and signatory of Notice of Appeal Angel Ruiz Rivera.

First Circuit's Order of August 5, 2008 denying and striking "Motion For Conversion of the Motion Requesting Court To Clarify Its Order Into A Motion For Panel Rehearing and/or Rehearing En Banc".

First Circuit's Order of April 30, 2008 denying and striking Co-Plaintiff and signatory of the Notice of Appeal, Ruiz Rivera's "Motion For Reconsideration" of Order dismissing him as a party.

First Circuit's Order of October 10, 2007 denying and striking petition of Co-Plaintiff, and signatory of the Notice of Appeal, Ruiz Rivera, for rehearing and rehearing en banc and for disqualification

First Circuit's Judgment of May 11, 2007 Summarily affirming the district court's denial of its motion for relief of judgment, filed under Fed. R. Civ. P 60(b).

Order of the District Court of January 18, 2006, ruling that " This case is under appeal."

Judgment of the District Court, of October 26, 2004.

ADMINISTRATIVE DECISIONS PETITIONED TO BE REVIEWED

Order of the Secretary of January 9, 1998 of the USDE Secretary affirming his final agency decision

Decision of the Secretary of October 28, 1997.

Decision of the USDE Administrative Law Judge (ALJ) of January 24, 1997

STATEMENT OF THE BASIS FOR JURISDICTION

Jurisdiction of this Court is authorized by 28 U.S.C. 1254.

Jurisdiction in the court of first instance was authorized by 28 U.S.C. 1331.

THE CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED IN THE CASE.

First Amendment: "Congress shall make no law...prohibiting the free exercise...or abridging the freedom of speech...or the right of the people...to petition the Government for a redress of grievances".

Fourth Amendment: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated..."

Fifth Amendment: "No person shall be ...be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Sixth Amendment: "In all criminal prosecutions, the accused shall enjoy the right to .... have the Assistance of Counsel for his defence."

Higher Education Act (HEA) of 1965 as amended, 28 U.S.C. 1070 et seq.

Title 34 Code of Federal Regulations Education Section 600.2

CONCISE STATEMENT OF THE CASE SETTING OUT THE FACTS MATERIAL TO THE CONSIDERATION OF THE QUESTIONS PRESENTED

Instituto de Educacion Universal ("IEU") was a non-profit educational institution founded in P.R. in 1981 by Co-Plaintiff Angel Ruiz Rivera, signatory of the Program Participation Agreement (PPA) with the U.S. Department of Education ("USDE") and of the Notice of Appeal in the instant and previous appeals (05-1775, 99-1628). Ruiz Rivera was also imputed Trust Fund Liabilities ("TFL's") by the Internal Revenue Service ("IRS") as the person responsible for the tax-debt of IEU. He was allowed to appear in representation of IEU before the Administrative Law Judge ("ALJ"), the District Court and the First Circuit for many years in violation of this Court's express prohibition. For this reason only, without more, both the District and Circuit courts had more than enough reasons to void the final agency decision. See Rowland v. California Men's Colony, 113 S.Ct. 716 (1993) and Grace v. Bank of Leumi, 04-5824 (2nd.Cir. 2006). Of course, "judgments which are void or are vehicles of injustice [can]not be left standing." Brennan, 450 F.2d at 1003; cf. Firestone, 76 F.3d at 1208.

Citation from Smalls v. United States, 471 F.3d 186 (D.C.Cir. 12/19/2006).

Under the leadership of Ruiz Rivera[1] and the members of its Board of Trustees,[2] IEU became the fastest growing institution of its kind in P.R. from 131 students in 1981 and a $400,000 annual budget to 5,000 students and a $15 million dollars budget in 1995-96. It developed from a vocational technical school into a higher education institution in 1991. It always received unqualified or "clean" opinions on its external audits by independent Certified Public Accountant (C.P.A.) firms. [3] Incidentally, these audits contradicted all the USDE "findings" and heretofore they have yet to be taken into consideration as part of the petition for judicial review of the final agency decision in question here. IEU was a model institution to the point that it was selected for many years among all others in P.R., most ironically by the USDE as their favorite site for its Student Financial Assistance Programs ("SFAP's") training sessions.

In September 1994 IEU opened a new branch in Caguas, P.R. and IEU promptly filed its application for extension of eligibility. Simply

---

[1] M.A. Education University of Illinois. USDE Fellow and Who's Who in American Universities and Colleges 1979.

[2] Oneyda Paneque, PhD. University of Illinois; Carlos Quinones Alfonso, M.A. Harvard University; Carlos Perez Diaz, M.D Stanford U.; Fernando Rivera Munich, Fordham U., J.D. U.P.R. and others.

[3] IEU had Peat Marwick (KPMG) for both institutional and federal funds "single audits" from 1987-1991 and Valdes Garcia & Marin (VGM) from 1991-95 for the latter, retaining KPMG for the former.

because Ruiz Rivera moved to ask a USDE officer to expedite that application, certain USDE officers responded with an unprovoked invidious discriminatory treatment based on ethnicity and their resentment for Puerto Rico being the fourth recipient of SFAP's without paying taxes. In June of 1994, the Office of Inspector General ("OIG") had initiated an audit of IEU. Two "findings" resulted from it: the clock hour and the excess cash "findings". IEU immediately responded by proving that the clock hour "finding" was against: 1) a legal opinion by the Office of the General Counsel; 2) a Policy Memo developed by the USDE's Chief Auditor; 3) a USDE's Administrative Law Judge (ALJ) decision in In The Matter of Denver Paralegal Institute, 92-86-SP,92-87-SA and 4) another decision In The Matter of MBTI, 93-147-SA. Ergo, it was against the longstanding policy of the USDE. IEU also proved that the excess cash "finding" was against all mathematical and accounting logic, and the Generally Accepted Accounting Principles (GAAP's) as established in the independent audits by KPMG and VGM on IEU's finances.

In March 1995, the USDE denied the Caguas application based on the pretext that IEU allegedly did not meet the acid ratio test. In order to deliberately arrive to this desired result, the USDE arbitrarily, capriciously and ultra vires applied to IEU the GAAP's applicable to profit making institutions although IEU was non-profit. The USDE as a result, conditioned the continuation of IEU's eligibility to the production of a letter of credit for $8.875 million dollars. While IEU naturally objected, it offered a

payment and performance bond expressly provided for in the applicable Higher Education Act (HEA) of 1965, as amended, 28 U.S.C. 1070. The USDE denied this statutory right as it did with all the over 50 petitions that Ruiz Rivera and other members of his staff made on behalf of IEU.

The USDE followed with still another audit by its Institutional Review Branch (IRB) named Program Review which resulted in the "unpaid refunds finding" for $655,554 corresponding to 512 cases. IEU immediately submitted evidence proving that in only one transaction in July 1995 it had paid over $1,120,192 in refunds, proving without doubt that the "finding" was evidently wrong. To this date, the USDE has decided contrary to this hard evidence emanating from official USDE documents. See Appendix 17, 18 of the Appendix Of Brief Of Appellant.

Then the harassments and persecutions against Ruiz Rivera and IEU escalated. In September 1995, before the USDE had issued even its OIG Report, it had already reported to Congress that IEU had allegedly violated the clock hour regulation for the years 1991-94 owing over $3.4 million dollars. In October 1995 it unilaterally and in breach of contract (the Program Participation Agreement-PPA) switched IEU to the reimbursement method of payment. It then commenced deliberate dilatory tactics in the disbursement of the funds owed, asking for different requirements each time against its own Reimbursement Manual rules. On October 31, 1995 Ruiz Rivera had to personally guarantee a $300,000 loan to pay IEU's payroll as a result. On December 20, 1995, he took an additional

$450,000 for same purpose. In the meantime, the Caguas application was never approved. Later Ruiz Rivera's hypothecated all his properties plus idem had his father and mother in order to obtain funds to pay the legal honoraria that started to accumulate in order to be able to seek justice and defend their dignity, honor, image, integrity and prestige in the community.

The USDE then improvidently initiated Termination procedures without due process on March 12, 1996, since the Final Program Review Determination (FPRD) was not issued until June 3, 1996 and the Final Audit Determination (FAD) was not issued until June 28, 1996, consequently not having honored nor respected IEU's right to even respond before initiating punitive measures. See Exhibits 5, 4 of the Appendix Of Brief For Appellant, supra.

The USDE intensified their deliberate dilatory tactics in disbursing which prompted Ruiz Rivera to retain counsel to file on his behalf, IEU's and other employees, on July 23, 1996 an Injunctive Relief Petition (IRP) Constitutional Torts and Bivens Complaint against the USDE and eleven (11) of its officers involved in this evidently obvious persecutory scheme, [96-1893(JAF)].

On August 18, 1996 the District Court issued a Show Cause Order that surprisingly contained the same USDE claims regarding the clock hour "finding" issue, even when at that juncture the USDE had not even appeared in court in any way or fashion. This was at least suggestive of ex-parte communications that were later denounced both intra and extrajudicially by

Ruiz Rivera. On September 5, 1996, the only hearing ever held related to this controversy was abridged since the USDE announced in court that it had approved the release of some $800,000 that it had deliberately delayed in disbursing.

On September 18, 1996, upon their attorneys abrupt resignation, Ruiz Rivera, then appearing Pro Se and in representation of IEU, opposed the USDE dismissal only to find that the court had denied the injunction, seven (7) minutes **before** his opposition had been filed. Later it was verified that the denial occurred two (2) days **before** the dateline that the court had allowed the then resigning attorney to file the opposition. This railroading without even the appearance of due process was denounced by newly retained Attorney B.F. Cerezo intrajudicially through motion for reconsideration, to no avail. Ruiz Rivera denounced this extrajudicially through complaints of judicial misconduct ignored by First Circuit Chief Judge Torruella, and eventually by the First Circuit Judicial Council [4].

After releasing the funds they had deliberately frozen, the same USDE officers Defendants in the Bivens Complaint assured themselves that IEU and Ruiz Rivera did not have the money necessary to pay their lawyers[5] when

---

[4] At this stage Ruiz Rivera became so desperate that he filed 00-1609(DRD) against the First Circuit judges on his hypothesis that their Judicial Council actions were administrative and not judicial. It was denied even before the judges were summoned and its appeal 1-1611 affirmed amidst Ruiz Rivera's motion for recusal since the reviewing judges were the Defendants themselves.

[5] Ruiz Rivera initially retained the firm of Dow Lohnes

they immediately resumed their dilatory tactics in obvious retaliation in reprisal for IEU and Ruiz Rivera having sued the government and themselves. The resulting economic asphyxiation of IEU and Ruiz Rivera was evidently made in violation of their Sixth Amendment right to hire legal counsel of their choice since by very accommodatingly and conveniently freezing the funds, the USDE officers assured themselves that neither IEU nor Ruiz Rivera could continue prosecuting their Constitutional Torts and Bivens Complaint, consequently violating also their First Amendment rights. Because of the predicament

---

and Albertson from Washington, D.C. who invoiced over $240,000 in a few months before ever filing anything in court. Because of the ineffective assistance of this counsel he hired in P.R., Ricardo Rodriguez Padilla, Esq., who pretended to collect over $160,000 also before filing anything in court. He then had to settle with Waleska Marrero Melecio, Esq., and Charles Candelaria Farulla, Esq., with little experience in federal court, (paid about $30,000) and Andrew Usera, Esq. from Washington, D.C. (paid about $30,000) to litigate before the USDE. Since he was left without resources, he started litigating Pro Se before the ALJ and the District Court. When this court railroaded the injunction he hired Benny Frankie Cerezo, Esq. (paid about $30,000), the husband of then Chief Judge Carmen Cerezo, only to later find out that both were persona non-grata for the U.S. Attorney, the District Court presiding judge Fuste and the Chief Judge of the First Circuit, a fait accompli that is evidenced by the record in In Re: U.S.A. (Munoz Franco), 98-1765, and the subsequent public reprimand against Judge Cerezo by the Judicial Council. This fact certainly did not aid IEU's nor Ruiz Rivera's representation before the above not any of the other judges in these forums.

they fell into, Ruiz Rivera was forced to start to appear Pro Se in representation of IEU in the administrative proceedings and the federal courts with the government counsels non-objection and the acquiescence of all the forums.

Relevant to this point is the fact that when Ruiz Rivera announced IEU's C.P.A. firms' partners as witnesses to the ALJ, they were intimidated by the USDE legal counsels. See excerpt of administrative hearings transcript where this is confessed to and even boasted about. See IEU's October 25, 2005 Motion for Relief of Judgment, (MRJ) at p. 32, and Exhibit 20M of the Appendix Of Brief For Appellant, supra. When Ruiz Rivera moved for a continuance for humanitarian reasons days before the hearings since Hurricane Hortense had left him without electricity nor water trying to maintain afloat a ship with 5,000 students and 500 employees, without economic resources and totally discredited, it was objected by these same USDE legal counsels and denied by the ALJ. See Exhibit 20G, 20H, 20I of the Appendix Of Brief For Appellant, supra. When attorney Cerezo appeared before the ALJ and moved to request some time to familiarize with the record it was also denied. See Exhibit 20K of the Appendix, supra.

On January 24, 1997, the ALJ ruled the clock hour "finding" in IEU's favor, but although this was the liability with the highest amount of money involved, he contradictorily ruled in favor of termination. IEU appealed immediately and so did the USDE (re: the clock hour "finding" issue). On February 7, 1997, the USDE officers who knew or reasonably should had known that they

did not have a final decision on their favor yet, preconfiscated over $2.263 million they had deliberately delayed in paying IEU, an anathema to IEU's and Ruiz Rivera's Fourth and Fifth Amendment rights. In addition they hastily and maliciously moved to notify the student loan agencies that IEU's eligibility had been terminated.

In the meantime, Ruiz Rivera filed before the First Circuit appeal 97-2205 of the first railroading of 96-1893(JAF), Pro Se and in representation of IEU, together with an In Forma Pauperis (IFP) application which was granted by Circuit Judge Michael Boudin. The Circuit ruled later want of jurisdiction due to the lack of a final judgment by the District Court upon all claims.

As the logical result of the USDE officers having public discredited and economically asphyxiated IEU, its enrollment had been decimated from 5,000 to 250 students. The ones left however made a commitment to pay their tuition and fees with student loans only to find them rejected, cancelled or worse, their loan checks placed stop payment orders on them, simply because the loan agencies had been informed by the USDE of IEU's "termination." Faced with this latest abuse, Ruiz Rivera requested attorney Cerezo to file an action in representation of one of the affected students, Josefina Quinones v. USDE, Great Lakes Higher Education Corp. and Sallie Mae Marketing Association, 97-1722 (HL). In that controversy, Judge Laffitte issued an order questioning why the students were making claims for IEU, when they were clearly making claims for their loans.

The USDE responded with a letter from its Compliance and Enforcement Director certifying to the student loan agencies that IEU had not lost its eligibility, since the ALJ decision was under appeal, consequently admitting that the loan denial was wrong. Not only that, but the Assistant U.S. Attorney (AUSA), Ms. Isabel Munoz Acosta, Esq., representing the USDE in all these proceedings, also issued a letter to Cerezo making same certification. See these letters under Appendix VI-4. Cerezo then decided to file a motion within 96-1893(JAF), but to no avail. Ruiz Rivera then filed again Pro se and in representation of IEU, 98-1300 (SEC)(JAG), Instituto de Educacion Universal v. USDE, Great Lakes and Sallie Mae. Amidst the evidence cited above this one was also railroaded and idem happened with its appeal 02-1744.

In the meantime, on October 28, 1997 the USDE Secretary issued his final agency decision which overruled his ALJ with regards to the clock hour finding issue but determined that the termination of eligibility to continue administering SFAP's was unwarranted for lack of evidence of intentional wrongdoing. This was a pyrrhic victory for IEU since it was too little too late, since without the student loans and Ruiz Rivera having extinguished all his and his close relatives credit, IEU could not survive.

Ironically, if only the student loan agencies would had been ordered to honor the loans, as the court should have, given the fact that the government had conceded in writing that termination was not final, with this only, IEU would had been able to rehabilitate itself however

slowly and strenuously. Ruiz Rivera appealed this final agency decision, again Pro Se and in representation of IEU and was docketed at the First Circuit as 98-1242, only to be transferred to the District Court where it was docketed as 98-2225(RLA).

Since Ruiz Rivera and IEU remained struggling for their rights against the USDE officers Defendants in the Constitutional Torts and Bivens Complaint, the latter then proceeded to ultra vires attempt to collect over $22 million dollars from Ruiz Rivera and threw the U.S. Department of the Treasury all over him on December 22, 1998 giving him 10 days to pay over $29 million or face a "very aggressive legal collection action". See these collection notices as Appendix VI-5. Ruiz Rivera, without money, having had his father and mother lost their homes for having mortgaged them for loans whose product was given Ruiz Rivera to pay attorneys was forced to file still another cause of action against the IRS 99-1012 (CCC)(SEC)(JAG). In that controversy, Ruiz Rivera also claimed that the IRS had deliberately filed an illegal lien over Barbosa 404, the main property that used to belong to IEU and which had been legally sold and bought by a related corporation wholly owned by Ruiz Rivera, namely Compania de Inversiones Urayoan (CIU), as a result of the USDE's ultra vires treatment of IEU's financial statements as if it was profit making.

The IRS also had deliberately disclosed confidential tax information on Ruiz Rivera and related parties to third parties who had entered into a 10 year lease agreement that represented to

Ruiz Rivera, IEU, and CIU, that they could all survive, keep the Barbosa 404 property (appraised in 1995 for $6 million dollars), and most significantly, that they could pay the IRS all the tax debts accumulated. The undisguised personal agenda to destroy Ruiz Rivera proved to be greater than the interest to collect the tax debt, all this resulting in none of the parties receiving anything.

Controversy 99-1012 was also railroaded as its appeal 03-1083 also was, only confirming the pervasive bias and prejudice against Ruiz Rivera, IEU, CIU and anything that had to do with Ruiz Rivera for having had dared to challenge the abuse under the color of authority of by now too many federal officers from various agencies.

In the meantime, controversy 96-1893(JAF) had been railroaded again and idem happened with 98-2225(RLA), as a result of which Ruiz Rivera filed notices of appeal for both, which were docketed as 99-1398 and 99-1628 at the First Circuit which consolidated them. The U.S. Attorney's Office (USAO) attorneys finally objected to Ruiz Rivera's appearance for IEU after litigating for both for more than five years. But since he had managed to finally sell the Barbosa 404 property, (although at an over a 1.2 million dollar loss), he had sufficient resources to retain Roger Maldonado, Esq., of Balber Pickard Battistoni Maldonado & Van Der Tuin from N.Y, as counsel [6] with Frank Inserni, Esq. partially participating in P.R. [7] It was then and why that

---

[6] This law firm was paid over $125,000 by Ruiz Rivera.

[7] Inserni only collected $5,000 since he is an ex-classmate

Ruiz Rivera withdrew his appearance from 99-1628. Actually, he appeared Pro Se in the oral argument of the consolidated appeals.

Then the First Circuit panel with Chief Judge Torruella presiding, contradictorily affirmed 96-1893(JAF), the Constitutional Torts and Bivens Complaint, but simultaneously remanded 99-1628, the petition for judicial review of the final agency decision made by the same Defendants in the Constitutional Torts and Bivens Complaint. Ruiz Rivera in his petition for rehearing en banc in 99-1398, out of pure logical reasoning timely raised to the First Circuit that pre-exonerating the USDE officers before the judicial review of their actions was done and over seemed to be wrong. History proved that he was right indeed in this assessment although he is not a lawyer.

After the remand, it took the court almost five years to railroad it again, without discovery or a day in court. IEU's counsel resigned since Ruiz Rivera owed money he could not pay. The judge did not grant the resignation leaving IEU and Ruiz Rivera with counsel de jure but not de facto which caused their appeal of that second railroading to be filed late. Then on October 2005, IEU filed its Motion For Relief of Judgment based upon FRCP 60(b). Same was never evaluated on the merits, the Circuit affirmed same atrocity and that is the primary reason why we are still here searching for Justice.

---

and friend of Ruiz Rivera.

DIRECT AND CONCISE ARGUMENT AMPLIFYING THE REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

All that the District Court did with our timely filed FRCP 60(b) motion was to deny it with an order stating: "This case is under appeal." That was it. We consider that the Circuit Court erred by considering the district court's interlocutory order or procedural ruling reading: "**This case is under appeal**", as a final judgment and assuming jurisdiction over it instead of remanding for a final determination on the merits of the FRCP Rule 60 (b) Motion. See Torres v. Chater, 125 F.3d 166 (3rd.Cir.1997), Miller v. Marriott International, 300 F.3d 1061(9th.Cir.2002), Penn West Associates v. Cohen, 371 F.3d 118(3rd. Cir. 2004), Butz v. Mendoza-Powers 474 F.3d 1193 (9th.Cir. 2007). For this reason only, this Court should consider granting this Petition, vacating the order and remanding for consideration of the FRCP 60 (b) motion on the merits as the jurisprudence and mere prudence dictate.

We must remember that after the USDE issued its final decision against IEU, it was appealed by its President, Ruiz Rivera, Pro Se and In Forma Pauperis (IFP) before the First Circuit, (98-1242), transferred to the district court [98-2225 (RLA)], where it was railroaded, appealed (99-1628), and remanded, 209 F.3d 18 (1st Cir. 04/12/2000). The mere fact that the courts allowed Ruiz Rivera, a lay person, to appear in court for IEU the corporation, against the stare decisis of this Honorable Court which explicitly forbids same, should had been sufficient reason for the

First Circuit to void the judgment below under FRCP 60(b) 4. See Rowland v. California Men's Colony, 113 S.Ct. 716 (1993) and Grace v. Bank of Leumi, 04-5824 (2nd.Cir. 2006) Of course, "judgments which are void or are vehicles of injustice [can]not be left standing." Brennan, 450 F.2d at 1003; cf. Firestone, 76 F.3d at 1208. Citation from Smalls v. United States, 471 F.3d 186 (D.C.Cir. 12/19/2006).

It took the district court almost five (5) years only to railroad it again without a modicum of discovery much less a day in court in a ruling contrary to the evidence. It was re-appealed (05-1775) but never evaluated on the merits because it was filed late due to excusable neglect since counsel resigned for lack of payment of honoraria but the district court did not grant same. See Pioneer Inv. Serv. v. Brunswick Assocs. 507 U.S. 380,385(1995), In Re Osoborne, 379 F.3d 277 (5th.Cir. 2004). This predicament by judicial fiat left IEU in a representational limbo and Ruiz Rivera inhibited from filing the notice of appeal on his own due to the prohibition against hybrid representation. Instead Ruiz Rivera did file another Injunctive Relief Petition requesting from the district court to order the USDE to payback the $2.263 million dollars that the USDE had preconfiscated without due process back on February 7, 1997 without even a final decision so that Ruiz Rivera could exert his Sixth amendment rights to counsel of his choice and pay him/her. In the same petition Ruiz Rivera notified-in-advance that he intended to appeal. See Appendix VI-6. These extraordinary circumstances worsened when the district court granted Ruiz Rivera an

extension of time to retain counsel for IEU only to void it later nunc pro tunc.

As we have already seen, later when IEU timely filed, through this appearing counsel a Federal Rule of Civil Procedure (FRCP) 60(b) Motion based on new evidence and fraud upon the courts, it was also not evaluated on the merits because the district court ruled that "This case is under appeal". As an obvious interlocutory order which by its own nature limited itself to be a mere procedural ruling, it is highly questionable, to say the least, that it may have met the finality requirement for the Circuit court to assume jurisdiction over its appeal or in other words, if same appeal was effective due to the lack of a final judgment on the merits of the FRCP 60(b) motion. For this reason only, this Court should grant this Petition vacate the Circuit Mandate and Judgment and remand the Order to the district court. See Gonzalez v. Crosby, 545 U.S. 524, 2005.

In the event that the Circuit Court's Judgment is evaluated, this Court should take into consideration the fact that among the new evidence produced at the FRCP 60 (b) juncture, there was a clause found in the applicable statute [the Higher Education Act (HEA) of 1965 as amended], which explicitly, expressly and specifically proscribed the application of the regulation for the year upon which the clock hour "finding" was upheld. See Manhattan General v. Commissioner, 297 U.S. 129, cited in MRJ, pp.14, 15 and Appellants Brief at p 43. Appendix VI-7. In addition, we must clarify that before this new evidence, IEU had already produced evidence that

proved that the clock hour regulation interpretation "criteria" utilized to uphold this "finding" was contrary to a longstanding series of decisions by USDE authorities, including, an Office of the General Counsel legal opinion, the USDE Chief Auditor Policy Memo, an ALJ decision in In The Matter Of Denver Paralegal Institute, 92-86-SP,92-87SA and in In The Matter Of MBTI, 93-147-SA and another different ALJ in In The Matter Of IEU, 96-28 ST, 96-93 SP and 96-103-SA, itself. See Exhibits 8, 9, 10, 11 and 13 in the Appendix Of Brief Of Appellant, supra. See NLRB v. International Union, 460 F.2d 589 5th.Cir.1972.

Additional overwhelming evidence of smoking gun quality was submitted that proved without doubt that the imputed "unpaid refunds" had been paid, when and how. This evidence was more specific since it included for each one of the 512 cases, their social security numbers, the amounts refunded, the date, and the specific batch numbers in which each one was refunded with cross reference to the Pell Grant Student Payment Summary roster. See Exhibits 1a, 1b, 1c, 1d, and 1e of the Motion For Relief Of Judgment, supra. Also see Exhibit 19 of the Appendix Of Brief Of Appellant, supra.

The new evidence also included a pertinent and relevant excerpt of the handwritten notes from expelled OIG AIC Nater found in his audit work papers where he himself labeled IEU's data in this vein was "accurate" and which consequently proved without a doubt that the excess cash "finding" was inflated against all mathematical logic and against the applicable

GAAP's. Same evidence was in addition to the exonerating Quality Assurance Review Team Report (QARTR) excerpts that Ruiz Rivera was able to obtain that even chastised this "finding" by denouncing that its "logic is faulty", "cannot be justified" and is "not supported by the work papers", amidst the fact that the QARTR was deliberately concealed from the ALJ by the USDE legal counsels and has remained concealed from all the courts by the U.S> Attorneys. See Motion for Relief of Judgment, supra, pages 23,24,25, 26. See Marsh v. Oregon Natural, 490 U.S. 360,378 1979.

All this new evidence also proved without doubt that the USDE legal counsels had abused the legal process, deliberately intimidated witnesses, wantonly concealed exonerating evidence, maliciously suborned perjury, unethically obstructed justice and committed fraud upon the courts. See Kyles v. Whitley, 514 U.S. 419; also see Aoude v. Mobil Oil, 892 F.2d 1115, 1st.Cir. 1989, Dixon v. Commissioner of Internal Revenue, 00-70858 (9th.Cir.2003); Ty v. Softbelly's, 353 F.3d 528 (7th.Cir.2003); Schreiber Foods v. Beatrice Cheese, 04-1279(Fed.Cir. 2005); Info-Hold v. Sound Merchandising, 538 F.3d 448(6th.Cir. 2008).

Amidst this overwhelming evidence, of smoking gun and beyond doubt quality, the First Circuit besides assuming jurisdiction over an interlocutory non- final order over which it should not had, it then sua sponte took the position of the nisi prius court, and also did not take same evidence into consideration limiting itself to rule that "even assuming that the district court never

considered the merits, the motion would have had to be denied" and that "IEU appellate arguments are aimed at the merits of the petition for review", which were never evaluated. See May 11, 2007 Judgment.

Did the Courts below err in not considering the overwhelming exonerating evidence, deliberately concealed by the Respondent's legal counsels that prove that there was abuse of the legal process and fraud upon the courts de minimis? See Connally v. General Construction, 269 U.S. 385, 391, 1926, cited at Motion for Relief of Judgmnet at p. 21 and Appellants' Brief at p. 42, Kupferman v. Consol. Research, 459 F.2d 1072, 2nd.Cir.(1972), cited at Motion For Relief of Judgment at p. 38, Alexander v. Robertson, 882 F.2d 421, 9th.Cir. (1989), Pearson v. First N.H. Mortgage, 200 F.3d. 30, 1st.Cir. (1999), and Venture Industries v. Autoliv ASP, 457 F.3d 1322 (Fed.Cir. 2006).

This Honorable U.S. Supreme Court should know that the USDE expelled from its OIG, Mr. Rafael Nater, the experienced C.P.A. and lawyer who was the AIC of IEU's audit for his flaws in it and for his insubordinations. This fact was concealed from the ALJ and all the courts. The USDE then sat Nater's supervisor to testify for him, ergo the suborn perjury. The USDE legal counsels also maliciously concealed the fact that the OIG had issued a Quality Assurance Review Team Report that exonerated IEU from the two OIG audit "findings".

In view of the overwhelming evidence, the determinations by the lower courts here are contrary to the stare decisis of this Honorable

Court in the applicable and controlling jurisprudential precedents found in Klapprott v. United States, 335 U.S. 601(1949) and its progeny and Standard Oil Company v. United States (1976), 429 U.S. 17, and its progeny, plus contrary to Circuit Courts precedents in Simon v. Navon, 116 F.3d 1 (1st.Cir.1997), Federal Deposit Insurance Corp. v. United Pacific Insurance Co., 152 F.3d 1266 (10th.Cir.1998), Fobian v. Storage Technology, 164 F.3d 887 (4th. Cir. 1999) and In Re Lafata, MW05055, 1st.Cir. (2006). See Appellants Brief at p. 8. Also see United States v. Parcel of Land, 928 F.2d 1, (1st.Cir.1991), Plaud v. Spendthrift Farm, 514 U.S. 211 (1995), and Geo.P. Reintjes v. Riley Stoker, 71 F. 3d 44, (1st.Cir. 1995).

Did the Courts below err by deciding contrary to the overwhelming evidence proving without a doubt that: the clock hour "finding" regulation was applied contrary to the express, specific and explicit proscription in the statute; the fraudulently imputed unpaid refunds had been paid; and the excess cash "finding" was so deliberately inflated that it could not be reconciled neither mathematically nor accounting wise? See also Fed. R. App. P. 10(b)(2) ("If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the appellant must include a transcript of all evidence relevant to that finding or conclusion."), cited in Feliciano-Hill, v. Principi, 439 F.3d 18, (1st Cir. 02/22/2006). In the instant controversy we produced this evidence ad nauseam. See Exhibits 6, 7, 12, 14, 15, 19, 20M, 20N, 20O, 20P, 20Q, 20R, 20S, 20T,

20U and 20V of the Appendix Of Brief Of Appellant, supra.

Did the Courts below err in leaving out of the appeal Co-Plaintiff Angel Ruiz Rivera, IEU's President, when he suffered the quintessential injury-in-fact when imputed Trust Fund Liabilities (TFL's) by the Internal Revenue Service (IRS) as the person responsible for IEU's tax debt? See Manuel Lujan v. Defenders Wildlife, 112 S. Ct. 2130 (U.S. 06/12/1992) and its progeny.

In this vein, the ruling by the First Circuit affirming the forfeiture of the due process rights of Co-Plaintiff Ruiz Rivera to continue appearing in his own appeal of the controversy where he is a Co-Plaintiff after more than 12 years litigating before same forum is not only patently unjust but contrary to all of the below cited jurisprudence.

See Hispanic Society of New York City Police v. New York City Police 806 F.2d 1147, (2nd.Cir. 1986); In re Piper Funds, Institutional Government Income Portfolio Litigation, 71 F.3d 298, 301 (8th Cir. 1995); In re Estate of Marcos Human Rights Litigation, 94 F.3d 539 (9th Cir. 1996); United States v. Kirschenbaum, 156 F.3d 784 (7th Cir. 1998); Kaplan v. Rand, 192 F.3d 60 (2d Cir. 1999); Microsystems Software, Inc. v. Scandinavia Online AB, 226 F.3d 35 (1st Cir. 2000); Castillo v. Cameron County, 238 F. 3d 325 (5th Cir. 2001); Securities and Exchange Commission v. Forex Asset Management, 242 F.3d 325 (5th Cir. 2001); Karaha Bodas Co. v. Perusahaan Pertambangan, 313 F.3d 70 (2d Cir. 2002); Goya Foods, Inc. v. Wallack Management Co., 290 F.3d 63 (1st.Cir.5/17/2002); Plain v. Murphy Family Farms, 296 F.3d 975 (10th Cir.

07/16/2002); Cardoza v. Pacific States Steel Corporation, 320 F.3d 989 (9th Cir. 2003); AAL High Yield Bond Fund v. Banc of America Securities, 361 F.3d 1305 (11th Cir. 2004), Churchill Village v. General Electric, 361 F.3d 566 (9th Cir. 2004); Pediatric Specialty Care v. Arkansas Department of Human Services, 364 F.3d 925, (8th.Cir. 2004); In re Sealed Cases, 363 U.S. App. D.C. 214, 381 F.3d 1205 (D.C. Cir. 2004); United States v. Alisal Water Corp., No. 02-15907 (9th Cir. 2005); Velez-Diaz v. Vega Irizarry, 421 F.3d 71 (1st.Cir. 9/2/2005); Official Committee of Unsecured Creditors of WorldCom, Inc. v. Securities and Exchange Commission, 467 F.3d 73 (2d Cir. 2006).

More importantly, the lower courts determination with regards to this issue is inconsistent and directly in conflict with this Court's special reference to the specific legal issue in question on its express clarification in Devlin v. Scardelleti, 122 S.Ct. 2005, (2002) where you admonished that:

We have never, however, restricted the right to appeal to named parties to the litigation. Citations omitted. Emphasis supplied.

In view of all the above cited precedents, it is clear that the First Circuit's orders confiscating the most basic due process rights of Ruiz Rivera by ceasing to recognize his standing to appear in his own appeal is not only contrary to all judicial precedent but discriminatory, constituting a seldom if ever seen disparate treatment and a clear usurpation of its own authority. It is only consistent with the extreme bias and prejudice

with which all Ruiz Rivera's prayers for Justice have been treated for the past long twelve (12) years at this judicial forum.

All of the above Constitutional violations have been heretofore condoned with total impunity, due to the egregious dereliction in their ministerial and ethical duties by the intervening U.S. Attorneys who have heretofore neglected to prevent this fraud, while acting in their investigative role as their client agency counsels. See Ruiz Rivera v. Gonzales, 08-1560 at the U.S. District Court for the District of Columbia.

The First Circuit's ruling determining that "even assuming that the district court never considered the merits, the motion would have had to be denied" (sic) is in and by its own choice of words an outrageous confession of the extreme bias and prejudice denounced by IEU and Ruiz Rivera during years since it reflects in other words that no matter what, their motion would have had to be "denied." This expression speaks for itself.

The end of that ruling denying the motion since "IEU appellate arguments are aimed at the merits of the petition for review", are equally preposterous. Of course they are aimed at the merits of the petition for review and how could not they be if the petition for review has never been evaluated on the merits, even after the remand in 2000.

IEU insists that the evidence initially produced was more than enough quantitatively and qualitatively speaking, to provoke the elimination of all the audits findings if evaluated

by an objective mind. Having said the above, with the addition of the new evidence produced at the FRCP 60b Motion, the petition for judicial review of the final agency decision should end with a ruling against it. The facts, the evidence and the sui generis and extraordinary circumstances of this controversy demand and dictate that IEU should be vindicated.

SUMMARY OF ARGUMENT

The courts heretofore have failed to properly administer justice in this controversy primarily due to the evidently obvious misconduct by the USDE legal counsels compounded by the appearing U.S. Attorneys' egregious dereliction in their ministerial and ethical duties by failing to comply with the U.S. Attorney's Manual (USAM) mandates in providing adequate legal advice to their client agency, the USDE, in view of the fact that the latter acted against the law, the evidence and the Truth in a reiterated fashion, for their own shame and that of all of us that still trust and have confidence in this Judicial system.

This Court has the legal, ethical and moral responsibility of not only assuring itself that Justice is achieved in this controversy but more importantly it has the duty to produce a result that makes certain that misconducts like the one evidently obvious throughout the procedures below, do not ever repeat themselves in this Justice system. The main question that we very respectfully ask the Honorable Justices of this Honorable Court is if they are in a position to condone or acquiesce to the misconduct of the government lawyers here who have failed not only

to themselves and their oath of office but have failed to honor the candor, decorum and respect that the American Legal System and the courts deserve and should always demand from the officers of the court.

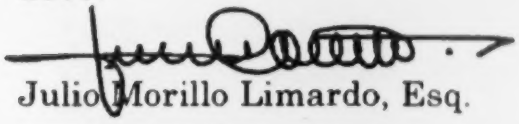
As a final note, the strong presumption of righteousness deferred to the government counsels should not be equated to infallibility. Deliberate indifference, incompetence, mediocrity, negligenge, ultra vires and wrongful actions performed under the color of authority should not be equated to overzealousness. The evidently obvious misconduct of the government attorneys here devastated the lives, not on one or two persons, which is sad enough, but of 5,000 students who ironically were making a decent and honest effort to become less dependent upon the government. Also negatively affected were 500 professors, administrators and employees that were working hard to aid the students reach that quest. Finally, you have a family of educators whose only goal, passion and vocation was to educate the disadvantaged to make them proud contributors to the economy and wellbeing of their own, their families and their country.

Very respectfully, this Honorable Court should not underestimate this fatal reality, that all this community was in the end viciously destroyed simply because a few federal officers wanted to give the impression they were doing their job right, in order to escalate a step or two in the civil service, and make a couple of thousand dollars more a year, when in reality, they were fabricating, manipulating, tergiversating and doing everything illegal and impossible to cover

up their farce. Recently, this Country has seen how similar conduct unbecoming by government lawyers have negatively affected the image of Justice, in cases such as the malicious prosecution of Senior Senator Ted Stevens from Alaska and the previous discriminatory treatment against eleven (11) U.S. Attorneys who were expelled. If these recent examples demonstrate that the most senior of the Senators of this Country and some of the most seniors of its U.S. Attorneys can easily be devastated with impunity, by a few unscrupulous attorneys, what can make you think that what we have been denouncing for fourteen years now, may not be true?

CONCLUSION

The petition for writ of certiorari should be granted. Respectfully submitted, today, July 6, 2009.



Julio Morillo Limardo, Esq.
U.S.D.C. D.P.R. #130811
U.S.C.A. 1.C. #82774
Avenida Betances I-17
Hermanas Davila,
Bayamon, P.R.00959.

08A883

IN THE SUPREME COURT OF THE UNITED STATES

ANGEL RUIZ RIVERA AND
INSTITUTO DE EDUCACION UNIVERSAL

PETITIONERS

V.

UNITED STATES DEPARTMENT OF EDUCATION

RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

PETITIONERS APPENDIX

JULIO MORILLO LIMARDO, ESQ.
AVENIDA BETANCES I-17
HERMANAS DAVILA
BAYAMON, P.R. 00959.
787-485-5437

APPENDIX

(i) Opinions and Orders
(ii) Other relevant orders, opinions
(iii) Order on rehearing
(iv) Judgment sought to be reviewed
(v) Material required by 1(f),(g)
(vi) Other material the petitioner believes essential to understand the petition

(i) Opinions and Orders

First Circuit's Order of December 2, 2008 denying and striking motion for court to rule on rehearing filed by Co-Plaintiff and signatory of Notice of Appeal Angel Ruiz Rivera.

United States Court of Appeals
For the First Circuit

No. 06-1562

ANGEL RUIZ-RIVERA, ET AL.,

Plaintiffs, Appellants,

v.

U.S. DEPARTMENT OF EDUCATION, ET AL.,
Defendants, Appellees.

Before

Lynch, Chief Judge,
Torruella and Selya, Circuit Judges.

ORDER OF COURT

Entered: December 2, 2008

Currently pending in the above-numbered appeal are two motions filed by Angel Ruiz-Rivera: (1) a motion to publicly denounce malicious and vindictive prosecutions and (2) an urgent motion beseeching this court to rule on the petition for rehearing en banc that Ruiz-Rivera had filed. However, and as we have held before, since appellant is not a proper party to this appeal, these motions must be stricken.

So ordered.

By the Court:

/s/ Richard Cushing Donovan, Clerk.

First Circuit's Order of April 30, 2008 denying and striking Co-Plaintiff and signatory of the Notice of Appeal, Ruiz Rivera's "Motion For Reconsideration" of Order dismissing him as a party.

United States Court of Appeals
For the First Circuit

No. 06-1562

ANGEL RUIZ-RIVERA, ET AL.,

Plaintiffs, Appellants,

v.

U.S. DEPARTMENT OF EDUCATION, ET AL.,

Defendants, Appellees.

Before

Torruella, Circuit Judge,
Selya, Senior Circuit Judge,
and Lynch, Circuit Judge.

ORDER OF COURT

Entered: April 30, 2008

For the reasons stated in one of our earlier opinions in these proceedings, see Ruiz-Rivera v. United States Dep't of Educ., No. 05-1775, 2006 WL 1343431 (1st Cir. May 10, 2006), the motion of Angel Ruiz-Rivera for reconsideration of our order dismissing him as a party to this appeal is denied. Since Ruiz-Rivera is not a party, the other pending motions that he has filed must be stricken.

So ordered.
By the Court:

/s/ Richard Cushing Donovan, Clerk.

Order of the District Court of January 18, 2006, ruling that " This case is under appeal."

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

INSTITUTO DE EDUCACION UNIVERSAL
VS.
UNITED STATES DEPARTMENT OF EDUCATION

CASE NUMBER: CIVIL 98-2225 (RLA)

ORDER

MOTION	**RULING**
Docket # 95	**DENIED. This action is on appeal.**

[X] Co-Plaintiff INSTITUTO DE EDUCACION UNIVERSAL

Title: Motion For Relief From Judgment

January 18, 2006 S/Raymond L. Acosta
Date RAYMOND L. ACOSTA
U.S. District Judge

Judgment of the District Court, of October 26, 2004.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

INSTITUTO DE
EDUCACION
UNIVERSAL, INC.,

Plaintiff v.

UNITED STATES DEPARTMENT
OF EDUCATION AND THE
HONORABLE SECRETARY OF
EDUCATION RICHARD RILEY,

Defendants.

CIVIL NO.98-2225 (F

ORDER GRANTING SUMMARY JUDGMENT FOR THE DEPARTMENT OF EDUCATION

These proceedings are based on Plaintiff INSTITUTO DE EDUCACION UNIVERSAL's (IEU) challenge to certain actions taken by Defendants, the U.S. Department of Education (USDE or EDUCATION), and the Secretary of Education (SECRETARY), to obtain reimbursement for federal funds allegedly received erroneously by Plaintiff in conflict with the requirements of the Higher Education Act of 1965, as amended, 20 U.S.C. §1070 et seq., (Title IV, HEA programs). The parties filed cross-motions for summary judgment, acknowledging that there are no disputed facts sufficient to give rise to a contested proceeding. Following a review of the administrative record created pursuant to the agency's process, and the arguments set forth by the parties, the Court hereby GRANTS summary judgment to USDE.

BEST AVAILABLE COPY

STANDARD FOR REVIEW

Plaintiff, a private post-secondary higher education institution that was eligible to participate in the Higher Education Act Title III and IV programs administered by the USDE, filed its Complaint to effectuate a remand from the First Circuit Court of Appeals to obtain judicial review of a final agency action pursuant to the Administrative Procedure Act, 5 U.S.C. §551 et seq. (APA). As a result, judicial review in this case consists of a review of the administrative record. Florida Power & Light Co. v. Lorion, 470 U.S. 729, 744 (1985). Although Plaintiff suggests that a *de novo* review may be appropriate here, it wholly fails to demonstrate the exceptional circumstances that could justify deviation from the well-established standard requiring a record review of administrative decisions. Town of Norfolk v. U.S. Army Corps of Engineers, 968 F.2d 1438, 1458-59 (1St Cir. 1992). ("Courts require a strong showing of bad faith or improper behavior before ordering the supplementation of the administrative record.")

In addition, pursuant to the APA, a reviewing court evaluates the propriety of an administrative action to determine if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law...". 5 U.S.C. §706(2). It is well settled that such an inquiry is ultimately narrow and limited to "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." Citizens to

Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971). Indeed, "(t)he Court is not empowered to substitute its judgment for that of the agency." Id.; and, in fact, "judicial review of administrative actions should be highly deferential to the agency." Organized Fishermen of Florida v. Hodel, 775 F.2d 1544, 1550 (11th Cir. 1985). Moreover, when conflicting views are expressed, "an agency must have discretion to rely on the reasonable opinions of its own qualified experts, even if, as an original matter, a court might find contrary views more persuasive." Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 378 (1979).

Summary Judgment Standards

As set forth by Rule 56(c), Fed. R. Civ. P., summary judgment is appropriate where the record shows no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. The First Circuit Court of Appeals has stated that the function of summary judgment is "to pierce the boilerplate of the pleadings and examine the parties' proof to determine whether a trial is actually necessary." Vega-Rodriguez v. Puerto Rico Telephone Co., 110 F.3d 174, 178 (1st Cir. 1997). "To defeat a motion for summary judgment, the nonmoving party must demonstrate the existence of a trialworthy issue as to some material fact." Cortes Irizarry v. Corporacion Insular, 111 F.3d 184, 187 (1st Cir. 1997). Furthermore, "[a] genuine issue of fact exists only if a reasonable jury could resolve it in favor of either party." Basic Controlex Corp. v. Klockner Moeller Corp., 202 F.3d 450, 453 (1st Cir. 2000). At this stage of theproceedings, both parties have acknowledged that summary judgment is the appropriate disposition of the matter given their pending cross-motions.

Having reviewed the parties' proposed findings of fact, as well as the administrative record, and based on the applicable law, the Court finds that summary judgment in favor of USDE is warranted.

THE FACTS[1]

1) To monitor a school's compliance with Title IV requirements, the USDE conducts program reviews through its Office of Student Financial Assistance Programs (SFAP) and audits through its Office of Inspector General (OIG).

2) Following the conduct of program reviews and audits, a program review report or a draft audit report is issued.

3) Liabilities are assessed by the USDE in documents called final program review determinations (FPRD) and final audit determinations (FAD).

4) In addition to assessing liabilities, the USDE may impose fines for any Title IV programmatic violation and may seek to terminate an institution's Title IV eligibility.

To the extent that proposed facts from either party are not adopted, they are rejected as either unsupported by the record, or as containing superfluous opinion or argument that is extraneous to the issue raised. See Ruiz v. Caribbean Restaurants, Inc., 54 F. Supp.2d 2d 97, 102. (D. Puerto Rico 1999).

5) An institution receives an administrative hearing before an USDE hearing official to contest any determinations and sanctions.

6) The hearing official's decision is appealable to the Secretary.

7) In May of 1994, USDE's OIG initiated an audit to examine Plaintiff's administration of the Title IV programs during 1991-92, 1992-93, and 1993-94.

8) A final audit report was issued on September 25, 1995.

9) The audit report found that Plaintiff violated Title IV requirements by: (1) overstating its clock hours of instruction and thereby improperly overawarding Pell Grant funds to its students (clock hour finding); and (2) requesting more Title IV funds than needed for disbursement to its students within three days of its receipt of the funds (excess cash finding).

10) For purposes of calculating its Pell Grant awards, the audit found that Plaintiff overstated the hours in its day class program by 220 hours (1440 instead of 1200) and in its night class program by 200 hours (1200 instead of 1000).

11) Plaintiff received $3,854,700 in additional Pell Grant funds as a result of the manner in which it computed its

clock hours of instruction during the three-year audited period.

12) The audit found that by violating the requirement to disburse funds within the required three days of its receipt of these funds, Plaintiff retained surplus funds of $542,947 at the conclusion of the audited period, and owed Education $213,917 in imputed interest for its ongoing excess cash balances.

13) On June 28, 1996, SFAP issued a Final Audit Determination (FAD) based on the OIG final audit report covering the 1991-92, 1992-93, and 1993-94 award years.

14) The FAD assessed a liability against Plaintiff of $756,864 for the excess cash finding, and $1,284,900 against Plaintiff for the clock hour finding for 1993-94.

15) Plaintiff appealed the FAD on August 12, 1996.

16) From April 18-22, 1995, USDE conducted a program review to examine Plaintiff's administration of its Title IV funds for its 1992-93, 1993-94, and 1994-95 award years.

17) A program review report was issued on October 26, 1995 that found that Plaintiff failed to make timely Pell Grant refunds during all three award years, and failed to make Pell Grant refunds during 1994-95 (refund finding).

18) On June 3, 1996, SFAP issued a Final Program Review Determination (FPRD) that assessed liabilities for therefund finding in

the amount of $720,386, to include $655,554 for Plaintiff's failure to make 512 refunds during 1994-95.

19) On July 17, 1996, Plaintiff appealed the FPRD.

20) On March 12, 1996, USDE notified Plaintiff of its intent to terminate the school's eligibility to participate in the Title IV programs, and to fine it $275,000 for the programmatic violations identified in the program review report and audit.

21) Plaintiff appealed the termination and fine actions on April 1, 1996.

22) The USDE's hearing official consolidated all three administrative actions involving Plaintiff.

23) An administrative hearing was held in San Juan, Puerto Rico in October 1996.

24) The hearing official issued his decision on January 24, 1997.

25) The hearing official affirmed the excess cash finding and the refund finding and assessed the associated liabilities. He reversed the clock hour finding in part, and reduced the amount of the fine to $150,000. The hearing official terminated Plaintiff's Title IV eligibility.

26) Both parties appealed the hearing official's decision to the Secretary.

27) In the final agency action, issued on October 28, 1997, the Secretary affirmed the hearing

official's excess cash and refund findings, but reversed the hearing official's clock-hour finding, reinstating the full liabilities.

28) Secretary sustained the amount of the fine, but reversed Plaintiff's Title IV eligibility termination.

29) The Office of Student Financial Assistance (SFAP) filed a motion for reconsideration that was denied on January 9, 1998.

30) As a result of the administrative process, Plaintiff was assessed a total of $2,875,879 in liabilities and fines that it challenged in this case. ($1,284,900 (clock hour finding) + $756,864 (excess cash finding) + $684,115 (refund finding) + $150,000 (fine) = $2,875,879.)

The Clock Hour Finding

The USDE's Pell Grant program assists low and middle income students with the cost of their educational instruction. The USDE administers the program to provide grants to qualified undergraduate students. 20 U.S.C. §1070a(b).

The USDE's regulations require that Pell Grant funds be disbursed to students in accordance with established payment periods. 34 C.F.R. §690.75 (1993-95). For each payment period, an institution may pay Pell Grant funds only to eligible students who have completed the requisite number of clock hours or credit hours of instruction. 34 C.F.R. §690.75(a) (3)(1993-95). Plaintiff measures its instruction in clock hours. A student completing more clock hours is either entitled to a larger

Pell Grant award or is entitled to the award at an earlier time. See 34 C.F.R. §§690.63(c) (1993), 690.63(a) (4)(ii),(e) (1994-95),690.75(a)(3)(i)(1993-95). Accordingly, an accurate calculation of the number of clock hours is relevant to determining the total amount of a student's Pell Grant.

During the 1993-94 award year, the USDE amended its regulatory definition of the term "clock hour" to mean:

A period of time consisting of - (1) A 50- to 60-minute class, Lecture, or recitation *in a 60-minute period;* (2) A 50- to 60-minute faculty-supervised laboratory, shop training, or internship in a *60-minute period.* 34 C.F.R. §600.2 (1994) *(emphasis added).*

In adopting this language, the Secretary stated that "[t]he revised definition of a clock hour requires that each clock hour of instruction take place in a discrete 60-minute period." 58 Fed. Reg. 36918, 36919 (July 23, 1993). Prior to the 1993-94 award year, a "clock hour" was defined as a "period of time consisting of ... a 50- to 60-minute class, lecture, or recitation."34 C.F.R.§600.2(1993). As a result, some schools, including Plaintiff, determined the number of clock hours in their programs of instruction by aggregating the number of minutes of instruction and dividing the number by fifty (50). To avoid this continued practice, and the concomitant inflation in the amount of Pell Grant awards, the Secretary adopted the above-stated change so that the aggregated minutes would have to be divided by sixty (60).

The USDE upheld the application of this regulatory definition to Plaintiff's practices pursuant to its administrative

process. In the final agency action, the Secretary expressly stated:

> I am very concerned about institutions calculating clock hours in a manner inconsistent with the regulation with the purpose of receiving funding prematurely for instructional hours that are not actually earned. Institutions must carefully and closely adhere to the method of calculation reiterated in this decision. (Administrative Record (A.R.) at 1880.) As a result, USDE assessed $1,284,900 in liabilities against Plaintiff for this regulatory violation.

As previously noted, the USDE is entitled to deference in the review of its agency action, with the administrative decision being set aside only if it is found to be arbitrary and capricious, an abuse of discretion, or contrary to law. Citizens Awareness Network v. Nuclear Com'n, 59 F.3d 284, 290 (1st Cir. 1995); see also Chevron USA Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). "This deference is especially marked in technical or scientific matters within the agency's area of expertise." Citizens Awareness Network, supra, 59 F.3d at 290. Moreover, an agency's interpretation of its own regulations is of controlling weight unless it is plainly erroneous or inconsistent with the regulation. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 359 (1989); U.S. v. Haagar Apparel Co., 526 U.S. 380, 392 (1999).

Here, the regulatory language is unambiguous, and it was enforced in a manner that is consistent with this language. There is no basis to find Education's behavior to have been arbitrary and capricious.

Plaintiff's complaint challenged USDE's clock hour finding in three principal ways, none of which serve to defeat USDE's Motion for Summary Judgment. First,

Plaintiff argued that the hearing process it received was deficient, alleging that USDE failed to consider or make available certain potential impeachment evidence, and did not call a particular witness. (Plaintiff's First and Second Cause of Action; Compliant 9[144-55.) In its argument, Plaintiff focused on conflicts that may have existed between the two OIG agents who participated in the OIG audit. However, even assuming *arguendo* that these potential witnesses had conflicting opinions on the enforceability of the audit finding, USDE's decision is exclusively a legal determination based on the propriety of Plaintiff's method of calculating clock hours. The only issue before the hearing official and the Secretary was whether the method of calculation Plaintiff used was permissible under the regulations. They both concluded on behalf of USDE that it was not. There is no basis to find that such a decision was arbitrary and capricious [2]

[2] The administrative record is replete with Plaintiff's acknowledgment of its clock hour calculation methodology: Plaintiff totaled the number of minutes of instruction time available during the day and divided that by 50 minutes, rather than by the 60 minutes required. See, e.g. A.R. at 564 (Plaintiff's Pre-hearing Brief, "(Plaintiff) takes the total amount of instructional time and divides it by fifty (50) minutes to compute clock hours."); 616 (Plaintiff's Response to the OIG Draft Audit, "The correct application ... should be to divide the 300 minutes of instruction by 50 minutes each."); 754 (Plaintiff's Response to the OIG Final Audit, "The Institute calculated its clock hours for its day program by taking the total amount of instructional time, 300 minutes (6 classes x 50 minutes) and dividing that total by 50 for a total of six clock hours. ... (Plaintiff) used the same methodology to compute its clock hours for its evening schedule to arrive at 5 clock hours."); 1729 (Plaintiff's Post-hearing Brief, "In determining the appropriate amount of Pell Grants to be awarded to its students, (Plaintiff) divides the total number of instructional minutes by 50 to arrive at the number of clock hours in its programs.")

Moreover, there is no evidence to suggest that USDE violated its regulations governing its administrative process through the method in which evidence was received and witnesses were called. Administrative tribunals necessarily have discretion to limit the evidence admitted and the witness testimony received. See, e.g., Davis v. Office of Personnel Management, 918 F.2d 944 (Fed. Cir. 1990). Nothing in the record suggests that the hearing official did anything other than appropriately manage the case before him.

Second, Plaintiff alleged that the USDE's clock hour regulation conflicts with a separate statutory provision. (Plaintiff's Fourth Cause of Action, Complaint at 1166-67, 69-70.) The statute in question precludes the Secretary from exercising "discretion, supervision or control over the curriculum" of an institution. 20 U.S.C. §3403(b). However, Plaintiff's argument is without merit. By defining a "clock hour" for purposes of measuring Pell Grant eligibility, the Secretary did nothing to restrict or control Plaintiff's curriculum. Rather, the Secretary merely established a standard for determining the amount of Pell Grant funding that a student may receive who is enrolled in an eligible program.

Third, Plaintiff alleged that USDE's decision conflicts with previous administrative case law. (Plaintiff's Fourth Cause of Action, Complaint at 1172-79.) However, this argument is baseless since the case law Plaintiff cited predates the regulatory change at issue here, and thus had no precedential effect on the agency's action against Plaintiff. There is nothing arbitrary and capricious about enforcing *new* regulatory language prospectively, in a manner that differs from the way in which *different* language was previously enforced.

Finally, in its Motion for Summary Judgment,

Plaintiff stated that USDE's "clock hour" regulation was not adopted until July 23, 1993, with an effective date of September 7, 1993, as part of a larger regulatory package. Thus, Plaintiff claimed that enforcing the regulation against Plaintiff for the 1993-94 award year (which ran from July 1, 1993 to June 30, 1994) constituted prohibited retroactive enforcement. Again, this contention is without merit.

The USDE did not engage in retroactive enforcement. The regulation in question did not adopt a new policy or change existing policy, but rather clarified it. Within the preamble to the regulation the Secretary stated, "The Secretary is revising the definition of the terms "clock hour" ... and "eligible program" to eliminate perceived ambiguities in those definitions, notwithstanding the fact that the Secretary believes that the current definitions are not ambiguous." 58 Fed. Reg. 39619 (July 23, 1993).[3] Thus, regardless of the effective date identified for the entire package of regulations, the matter under consideration here was not substantively changed, nor did Plaintiff lack notice of USDE's clock hour policy prior to the regulation's effective date. As a result, to the extent that Plaintiff chose to calculate Pell Grant awards contrary to this regulation at the beginning of its 1993-94 award year, it did so with a knowing disregard for the consequences.

[3] Within this preamble, the Secretary also referred to practices inconsistent with the regulation as conflicting with "the Secretary's long-standing interpretation under the current definition of the term "clock hour." Id.

Moreover, even assuming there was an issue of the USDE retroactively enforcing its clock hour regulation for a brief period of time, in this case it would have been appropriate.

The First Circuit Court of Appeals has evaluated the propriety of the retroactive application of an agency policy by determining whether it would result in a "manifest injustice". The Court has stated, while upholding various retroactive applications, "[u]nder the manifest injustice standard the disappointment of private expectations that results from the implementation of a new rule must be balanced against public interest in enforcement of that rule." New England Power Co. v. United States, 693 F.2d 239, 245 (1st Cir. 1982). See, also Adams Nursing Home of Williamstown, Inc. v. Matthews, 548 F.2d 1077, 1080 (1st Cir. 1977); Dedham Water Co. v. Cumberland Farms Dairy, Inc., 805 F.2d 1074 (1" Cir. 1986). Here, the balance weighs decidedly in favor of USDE; the Secretary has a strong incentive in seeing a policy enforced that was adopted to insure integrity in the administration of the Pell Grant program while Plaintiff's expectations are to receive excess Pell Grant receipts.

It is not the province of this Court to evaluate the wisdom of a particular agency policy, but rather to determine whether it has been enforced consistent with the law. Based on a review of the entire administrative record, it is apparent that USDE enforced its rules for Pell Grant calculations in accordance with the law, and that Plaintiff received the benefit of USDE's administrative process to challenge this enforcement. Thus, the USDE's actions were not arbitrary and capricious, and USDE is entitled to summary judgment on this matter.

THE EXCESS CASH FINDING

When an institution participates in the Title IV, Higher Education Act (HEA) programs, the institution acts in the nature of a fiduciary and is subject to the highest standard of care and diligence in administering these programs and accounting to USDE for the funds it receives. 34 C.F.R. §8668.82(a), (b) (1991-94). Within the context of the student financial assistance programs, all Title IV funds are held in trust for the intended student beneficiaries and USDE. Accordingly, a school that receives these federal funds must either credit them to student accounts, or return them to the USDE within a three-day period. See 31 C.F.R. Part 205 (1992); Recipient's Guide for the Department of Education Payment Management System (1993). A.R. at 174-182. Plaintiff does not contest the existence of this three-day requirement.

USDE, however, found that Plaintiff routinely violated the three-day requirement over a three-year period, consistently requesting and receiving Pell Grant funds in excess of the amount it would credit to student accounts. At the end of the three-year period, USDE found that Plaintiff held $542,947 in excess funds. In addition, USDE charged Plaintiff $213,917 in interest for the funds it improperly retained throughout these three years.

Plaintiff challenged this finding by suggesting that USDE should have evaluated its compliance with the three-day requirement by examining different records than it did. (Plaintiff's Fifth Cause of Action; Complaint at 1184-86.) It also suggested that there may have been another way to calculate the interest that it owes. (Plaintiff's Fifth Cause of Action; Complaint at 187.) However, Plaintiff offered nothing to show that USDE's

action was arbitrary and capricious.

The administrative record identifies with particularity the manner in which USDE rendered its assessment. See generally A.R. at 1278-1330. Both the hearing official, see A.R. 1769-1770, and the Secretary, see, A.R. at 1878, explained the evidence they reviewed and discussed the conclusions that they reached.

The fact that there may have been alternative ways to evaluate the evidence before the agency does not detract from the conclusions the agency rendered, nor does it suggest that the agency's decision was arbitrary and capricious. Rather, deference is owed to the agency's factual determination. As the First Circuit Court of Appeals has noted, "A reviewing court will not disturb ... findings so long as the (hearing official's) position represents a choice between two fairly conflicting views, even if the Court would have made a different choice had the matter come before it de novo." 3-E Co., Inc. v. N.L.R.B., 26 F.3d 1, 3 (1st Cir. 1994); see also Adams v. U.S. E.P.A., 38 F.3d 43, 49 (1st Cir. 1994). Given the existence of ample evidence to support its conclusion, USDE is entitled to summary judgment on this issue.

THE REFUND FINDING

If a student withdraws before completing a certain amount of his or her educational program, the school must return unearned portions of the student's tuition. For purposes of the Pell Grant program, an institution is required to return any monies owed on behalf of a student to the USDE if the student officially withdraws, drops out, or is expelled on or after the first day of class of a payment period. 34 C.F.R. §668.22(a) (1) (1992-1995). During the relevant time period here, these refunds payments were due within 30 days of the

student's withdrawal. 34 C.F.R. §§668.22(e)(5) (1992-93); 668.22(j)(4)(1994-95).

As explained within the administrative record, USDE permitted a school to pay Pell Grant refunds by one of two ways: either by directly sending a check to USDE for the amount of the refund due, or by drawing down less Pell Grant money for otherwise eligible new students while annotating specific student accounts to which the refunded money was credited. See, e.g., A.R. at 1440; 1756.

USDE assessed $715,456 for this violation consisting of $655,554 in unpaid refunds during 1994-95; $28,561 in interest on those unpaid refunds; and $31,341 in interest for refunds that Plaintiff paid late in previous years. Plaintiff did not challenge the assessment for the late paid refunds.

Once again, the administrative record identifies with particularity the manner in which USDE rendered its assessment. See generally A.R. at 1418-1434. Both the hearing official, see A.R. 1774, and the Secretary, see A.R. at 1878-79, explained the evidence they reviewed and discussed the conclusions that they reached. Nonetheless, Plaintiff challenged this finding on two bases.

First, Plaintiff claimed that it provided evidence of more than $1 million in refund payments that USDE did not properly consider. (Plaintiff's Sixth Cause of Action; Complaint at 1190-91.) However, to the contrary, the administrative record demonstrates that both the hearing official and the Secretary did consider this evidence, and rejected it, and provided an explanation for their decisions. See A.R. at 1774; 1878-89. Again, as explained previously, the careful consideration of competing evidence

and an agency's adoption of one permissible reading of that evidence will not be disturbed upon judicial review. 3-E Co., Inc., supra, 26 F.3d at 3.

Subsequently, Plaintiff filed additional new evidence with this Court in an attempt to show compliance with USDE's refund requirements. See docket Nos. 56, 57. This attempt to create a new record on appeal is rejected. As previously discussed, it is well established in APA cases that, "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." Camp v. Pitts, 411 U.S. 138, 142 (1973); see also Florida Power & Light Co. v. Lorion, 470 U.S. 729, 744 (1985). Plaintiff acknowledged this expected standard of review but argued that this Court can go beyond it if there is "a strong showing of bad faith or improper behavior", Town of Norfolk, supra, 968 F.2d at 1458, or if the agency deliberately excluded pertinent materials located within its files in an effort to manipulate its case on record review. Environmental Defense Fund v. Blum, 458 F. Supp 650 (D.D.C. 1978). However, the record before the Court shows no evidence of bad faith, improper conduct, or manipulation by USDE that would permit the Court to reopen the established agency record. As a result, the Court declines to do so.[4]

[4] It is beyond dispute that Plaintiff had ample opportunities during the many aspects of the lengthy administrative process to offer the evidence from its own files that it subsequently decided to produce before this Court. For whatever reason, Plaintiff apparently believed that the evidence it offered during the administrative proceeding was either more persuasive or was independently compelling. Such a tactical decision does not justify permitting supplementation of the record now. Moreover, the Court's review of the documents offered herein shows that even if they were considered, on their face, they do not respond to the specific failings identified within the administrative process for the

agency's conclusions.

Second, Plaintiff claimed that it was improperly assigned the burden of proof to contest the refund finding. (Plaintiff's Third Cause of Action; Complaint at 1156-60.) This argument is also without merit. This case consisted of several consolidated agency actions with the burden of proof residing at different times with different parties. Compare 34 C.F.R. §668.88(c)(2); 34 C.F.R. §668.116(d) (1996-98). However, after USDE satisfied its burden to establish Plaintiff's nonpayment of refunds, Plaintiff necessarily assumed the burden to support its defense that it actually did pay the refunds contrary to USDE's evidence. As both the hearing official, and the Secretary found, Plaintiff failed to do so. See A.R. at 1774; 1878-79.

As a result, the USDE's Motion for Summary Judgment is likewise granted as to this issue.

THE FINE

Plaintiff offered no specific challenge within its Complaint to the fine USDE imposed. Accordingly, Plaintiff's argument that the fine is arbitrary and capricious is purely derivative of its arguments above, and USDE is likewise entitled to summary judgment. In its Motion for Summary Judgment, Plaintiff argued that the fine is disproportionate because "it goes beyond what is prescribed and mandated by statute." (Docket No. 57 at 31-32.) This statement is without merit.

Thus, they could not support a finding that USDE's decision was arbitrary and capricious.

The statute authorizes a potential fine of $25,000 per violation. 20 U.S.C. §1094(c)(3)(B)(i). The agency action sustained fines of $25,000 for each of the three years that the school paid refunds late or not at all, for a total of $75,000, and $25,000 for each of the three years that the school retained excess cash, for a total of $75,000. Thus, the total fine is **$150,000.** The Secretary additionally could have fined the school for its improper Pell Grant calculations, but chose not to do so. These actions are consistent with the governing statute; they do not violate it. USDE is required to do nothing more.

CONCLUSION

For the reasons set forth above, the USDE's Motion for Summary Judgment **(docket No. 35)** is hereby **GRANTED** and Plaintiff's Motion for Summary Judgment **(docket No. 57)** is **DENIED.**

IT IS SO ORDERED.

San Juan, Puerto Rico, this 26th day of October, 2004.

S/Raymond L. Acosta
RAYMOND L. ACOSTA
United States District Judge

(ii) Other relevant orders, opinions

ADMINISTRATIVE DECISIONS PETITIONED TO BE REVIEWED

Order of the Secretary of January 9, 1998 of the USDE Secretary affirming his final agency decision

UNITED STATES DEPARTMENT OF EDUCATIO
THE SECRETARY

In the Matter of
INSTITUTO DE EDUCACION UNIVERSAL

Docket No. 96-28-ST
Docket No. 96-93-SP
Docket No. 96-103-SA

Student Financial Assistance Proceedings
PRCN: 199530200074 ACN: 02-40075

ORDER

On October 28, 1997, the final decision of the U.S. Department of Education, (Department) was rendered in the above-captioned case. In that decision, I found that Respondent maintained excess funds, failed to make timely refunds, and overstated the number of instructional clock hours. Accordingly, Respondent was ordered to reimburse the Department for the costs associated with these violations, totaling S2,762,150.00, and pay a fine in the amount of $150,000.00. Following this decision, on November 12, 1997, the Office of Student Financial Assistance Programs, (SFAP) filed a Motion for Reconsideration, requesting the imposition of termination.

BEST AVAILABLE COPY

Regulation 34 C.F.R. § 668.86 provides in pertinent part that:

(a) The Secretary may limit or terminate an institution's participation in a Title IV, DEA program or the eligibility of a third-party server to contract with any institution to administer any aspect of the institution's participation in any Title IV. HEA program, if the institution or servicer-

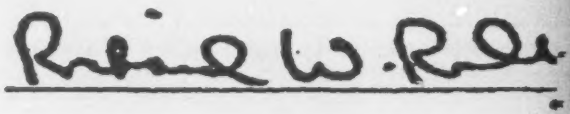
Violates any statutory provision of or applicable to Title IV of the HEA, any regulatory provision prescribed under that statutory authority, or any applicable special arrangement, agreement, or limitation entered into under the authority of statutes applicable to Title IV of the HEA. (Emphasis added).

This statutory provision assigns discretionary authority to the Secretary when reviewing termination proceedings. Regulatory violations committed by educational institutions may support an order of termination by this tribunal. Termination is not required, however, when an institution is found in violation of applicable statutory requirements. 34 C.F.R 668.86.

SFAP argues that my decision threatens the Department's ability to prevent continued misuse of student aid funds by suggesting that only "intentional wrongdoing" justifies termination. 5FAP's Motion for Reconsideration, p. L However, it is not the intention or the result of my decision to create a new standard for the imposition of termination. Clearly, "intentional wrongdoing" is not require- al to justify the imposition of termination. The imposition of termination may be warranted once it is determined that an institution has violated any of the applicable regulations, whether or not such violations were intentional. The phrase "intentional wrongdoing" was used only to describe one of a number of factors that this tribunal may, and/or did consider.

Therefore, after considering only the arguments of each party, SFAP's Motion for Reconsideration is hereby denied.

Washington, D.C.
January9,1998
Richard W. Riley



Decision of the Secretary of October 28, 1997.

UNITED STATES DEPARTMENT OF EDUC
THE SECRETARY

In the Matter
of

INSTITUTO de EDUCACION UNIVEBSAL

Respondent

Docket No. 96-28 ST
Docket No. 96-93-SP
Docket No. 96-103-SA

Student Financial Assistance Proceedings

PRCN: 199530200074 ACN: 02-40075

DECISION
OF THE SECRETARY

I. Procedure & Facts

In. 1994, the Office of Inspector General, (OIG) of the Department of Education, (Department) conducted an audit of Instituto de Educacion Universal's, (IEU's) administration of the financial assistance programs authorized by Title IV of the Higher Education Act of 1965, as amended, 20 U.S.C. § 1020, and 42 § 2751. As a result of the audit, OIG determined that IEU committed the following violation 1) IEU requested Title IV funds in excess of its immediate need; 2) IEU used Title IV funds for unauthorized purposes and 3) IEU

overstated clock hours of instruction and improperly disbursed Pell Grants to students.

The Final Audit Determination (FAD) against IEU issued by the Office of Student Financial Assistance Programs, (SFAP) assessed liability in the amount of $756, 864 for the excess cash violation and $ 1,284,900 for the overstatement of clock hours.

SFAP also conducted a program review. This review determined that IEU failed to make Pell Grant refunds and failed to make refunds in a timely manner. SFAP's Final Program Review Determination, (FPRD) assessed a liability against IEU in the amount of $720,836. On March 12, 1996, SFAP issued notice of intent to terminate the eligibility of IEU to participate in the student financial assistance programs, and to fine the school S275,000. In response, IEU requested a bearing to contest the termination and fine_All of these matters were consolidated and a bearing was held in San Juan, Puerto Rico on October 22-23, 1996.

On January 24. 1997, Judge F. O'Hair issued a decision upholding IEU's termination,

---

1. The Administrative Court properly determined that insufficient evidence existed to support a finding that IEU expended funds for unauthorized purposes.

imposing a fine of $150,000 and assessing liability in the amount of $1,477,230. The Court found 1) IEU consistently maintained program funds in excess of its need, and must reimburse the Department $756,864 for those excess funds and their costs; 2) IEU failed to make timely refunds to the Pell Grant program for the 1992'93, 1993-94 and 1994-95 award years and must reimburse the Department $62,532 in imputed interest costs of those late refunds; 3) IEU must reimburse the Department $655,554 for its failure to make a refund payment for the 1994-95 award year; and 4) IEU most reimburse the Department $2,300 for its tame to verify the elegibility for student number 27. Judge O'Hair, however, found in favor of Respondent on the issue of clock hours, determining that IEU did not overstate the number of clock hours in its programs.

On March 4, 1997, IEU appealed the Administrative Judge's decision. IEU asserts on appeal that the Court erred when it determined that 1)IEU mainlined excess cash; 2) IEU failed to pay refunds during the 1994-95 award year, and failed to make timely refunds during the 1992-93 and 1993-94 award years; 3) IEU should be fined S150,000; and 4) IEU's eligibility to participate in the Title IV, HEA programs should be terminated. SFAP appealed the Judge's finding that IEU did not overstate its member of clock hours.

II. Discussion

A. Respondent is Liable for the Maintenance of Excess Cash and Must Repay the Department for Interest Accrued

The Administrative Court determined that IEU improperly maintained excess cash beyond its immediate need by drawing down funds that were not disbursed to students or renamed to the Department within a three day period. 2 31 C.F.R.I 205.4(a) (1988) provides that

> Cash advances to a recipient organization shall be limited to the minimum amounts needed and shall be timed to be in accord only with the actual immediate cash requirements of the recipient organization in carrying out the purpose of the approval program: or project The timing and amount of cash advances shall be as close as is administratively feasible to the actual disbursements by the recipient organization for duet program costs and the proportionate share alloy allowable indirect costs.

[2] This determination is also supported by Recipient's Guide to the Payment Management System, Chapter 5, 6 (October 1995).

[3] In July of 1995 the Department codified 34 C.F.R § 668.166, which defines excess cash as "any amount of Title IV, HEA program funds, other than FFEL or Federal Perkins Loan Program funds, that an institution does *not* disburse to students by the end of the third business day following the date the institution received those funds." It was not until this rule that the three day requirement was explicit in the regulations.

'4 34 C.F.R.§ 668.82

Under this provision, and in accordance with its administrative duty to competently administer Title IV programs, 4 an institution is expected to return funds in excess of its immediate need. The audit conducted by OIG for the period of July 1, 1991 to June 30, 1994 revealed IEU maintained excess cash balances at the end of each month, accept two months, one in 1991 and one in 1993. The average excess cash balance at the end of the month was $1,367,783. In response to the OIG audit, IEU admitted to maintaining excess cash. At trial, however, IEU presented testimony stating that the funds in question were properly credited within three days of their draw-down, but posted at a later date. In several instances the credits were posted months after the financial event occurred, which was clearly not timely under the regulations.

Respondent failed to produce any evidence-refuting the audit finding. In fact, the evidence reviewed by OIG and the Court was directly provided by Respondent. Thus, the Court correctly found Respondent's testimony unpersuasive. Accordingly, by maintaining excess funds IEU was able to earn interest on Federal dollars. This interest represent; earnings the' Department was precluded from accumulating. Accordingly, IEU must pay the costs associated with maintaining excess cash in the amount of $756,864.

B. IEU Must Reimburse the Department for the Interest Cost Associated With Refund Violations

To participate in any Title 1V program, institutions

must maintain a fair and equitable refund policy. This policy provides for the return of the unearned portion of tuition and any other fees, for any student who receives Title IV assistance and later withdraws, drops out, or is expelled after the first day of the payment period. 34 C.F.R.§ 668.22(a). This refund must be made within 30 days of the date the student discontinues the program. 34 C.F..R.§ 668.22(g)(2)iv (1994). IEU admitted that its usual refunding practice was to offset refunds against figure draw downs from the Pell Grant Account each September following the award year. Decision at 3; SFAP Brief at 8. IEU compiled a list of late, or unpaid, refunds which disclosed 803 late refunds, totaling $971,914 for the 1992-93 award year; 865 late refunds, totaling $1,044,454 for the 1993-94 award year; and as of the time of the review, IEU failed to make 512 funds totaling $655,554, for the 1994-95 award year Decision at p.8. All refunds were paid for the 1992-93 and 1993-94 award years at the time of the review. Id. Again, this data was compiled and provided by IEU, and fully supports the Court's determination that Respondent failed to make timely refunds, as required.

IEU's contention that the refunds due in the 1994-95 award year have been satisfied is also unsupported by the evidence. The Court properly held that without evidence of IEU's

forbearance of awards associated with the enrollment of additional eligible students, its reduction of authorization in the Pell Grant Account does not clearly demonstrate the necessary refunds.

C. The Administrative Court Erred When It Determined That Respondent did not Overstate the Number of Clock Hours in Its Program During the 1993-94 Award Year

IEU offers two clock hour programs The day program is scheduled from 8:00 a.m. to 1:50 p.m. and consists of six 50 minute periods of instruction, with a 50 minute break scheduled between classes. This program is 350 minutes in length including 300 minutes of instruction. The night program is scheduled from 6:00 p.m. to 10:30 p.m. and consists of five 50 minute periods of instruction, with a 20 minute break scheduled between classes. This program is 270 minutes in length, including 250 minutes of instruction.

During an audit in 1994, OIG found that IEU "overstated the number of clock hours in ifs programs when it aggregated the total minutes of instructional time and *divided* that number by 50 minutes, instead of 60 minutes, as required by the regulations. IEU's method of calculation reflected that its day program consisted of 6 clock hours, (300 minute divided by 50), and the night program consisted of 5 clock hours, (250 minutes divided by 50). On June 28, 1996, SFAP determined that this calculation method used by Respondent was 'incorrect and resulted in IEU overcharging the pen Grant program an average of $1,234, 900 per year, by disbursing funds to students before they completed the regulatory clock hours of instruction. Respondent appealed.

On appeal, the Court found that IEU did not over award Pell Grants to students enrolled in the day program, and that the school over awarded only one-third of a clock bout per day for the students enrolled in the night program. The calculations used by the Court combined the total instructional and non-instructional time to arrive at the clock hour figure. Decision at 7. After combining the non-instructional and instructional time., the Court also added a 10 minute imputed break at the end of the school day and divided that total number of minutes by 60 to determine the number of clock hours for each program. Under this method, the day program consisted of 6 clock hours, (300 minutes of instructional time, 50 minutes of non-instructional time, and a 10 minute imputed break, divided by 60), and the night program consisted of 4.66 clock hours, (250 minutes of instructional time, 20 minutes of non-instructional time, and a 10 minute imputed break, divided by 60). This method of calculating clock hours is impermissible under the regulations.

A "clock hour" is defined in 34 C.F.R. § 6002 (1994) as a "period of time consisting of a 50 to 60 minute class, lector; or recitation in a 60 minute period." This definition is further interpreted in the Federal Register, which provides in pertinent part:

> To demonstrate the number of clock hours in an educational program, certain institutions have aggregated the number of minutes of instruction provided in that program; and have divided those minutes by 50.

> This practice is inconsistent with the Secretary's long standing interpretation under the current definition of the term "clock hour"." Under that interpretation, if an institution seeks to determine the number of clock hours in an educational program by aggregating the number of minutes in that program, it has to divide those minutes by 60 rather than 50. The revised definition of a clock hour requites that each clock hour of instruction takes place in a discrete 60-minute period.
>
> 58 Federal Register 39618, 39619

Under these mandates, the methods of calculation applied by Respondent and the Court are impermissible. Responded violated the regulation when it divided the total number of minutes of instruction by 50 minutes, rather than 60 minutes. The Court's method contradicts the definition of a clock hour, which includes only time spent in class, lecture or recitation, in a discrete 60 minute period. Under this definition a clock hour may not include imputed non-instructional time. Clock hours are reflected by the total number of instructional minutes, occurring within discrete 60 minute periods. Therefore, the Court's method of totaling instructional minutes and non-instructional minutes is improper.

The Court's clock hour formula violates the plain meaning of this regulatory definition, contradicts the statements of the Secretary found in the Federal Register, and allows the institution to receive funding for huge periods of time when instruction is not rendered.

I am very concerned about institutions calculating clock hours in a manner inconsistent with the regulations with the purpose of receiving funding prematurely for instructional hours that are not actually earned. Institutions must carefully and closely adhere to the method of calculation reiterated in this decision. Therefore, IEU must recalculate its student awards for the 1994-95 award year, and the Liability assessed in the FAD is upheld. 5

D. The Court Properly Found that IEU Must Reimburse the Department $2,300 for its Failure to Verify the Eligibility for a Student

The Court heard and reviewed the evidence presented regarding student verification. IEU did not include any argument in its brief denying this allegation. Having no new evidence to consider on appeal, the Court's determination on this issue is affirmed, and IEU must reimburse the Department for the funds paid to a student without proper verification.

---

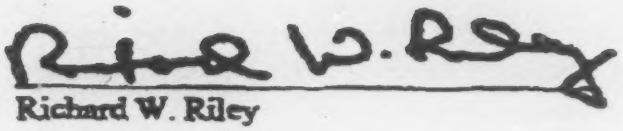
[5] Although the OIG found this violation for the three award years under review, SFAP only assessed liabilities for the 1993-94 award year. Thus, the liabilities assessed by this tribunal only reflect violations from the 1993-94 award year.

III. Conclusion

IEU must reimburse the Department 5756,864 for the maintenance of excess funds. must reimburse the Department $62,532 in interest costs for late refunds for the 1992-93, 1993-94 award years, and $655,554 in unpaid refunds for the 1994-95 sward year. IEU must reimburse the Department $1,284,900 for overstating the number of clock bouts of instruction. IEU must reimburse the Department $2,300 for its failure to verify the eligibility for student number 27. These violations committed by Respondent require immediate corrective action, including full repayment of the resulting costs sustained by the Department. Termination, however, is not warranted in light of the $I50,000 fine 'imposed, and the lack of evidence establishing Respondent's intentional wrongdoing_ The violations in the instant case, although serious, do not illustrate Respondent's incapability to properly administer Title IV financial assistance programs in the fame after the needed corrective measures are in place.

ORDER

It is hereby ordered that, in the manner prescribed by law, Respondent reimburse the United States Department of Education $2,762,150, and pay a fine in the amount of $150,000. The order terminating Respondent's eligibility to participate in the student financial assistance programs is hereby reversed.



Richard W. Riley

Washington, D.C.
October 28,1997.

Decision of the USDE Administrative Law Judge (ALJ) of January 24, 1997

UNITED STATES DEPARTMENT OF EDUCATION
WASHINGTON. D.C. 20202

In the Matter of

INSTITUT() de EDUCACION UNIVERSAL.

Respondent.

Dock
Dock
Dock
Stud
Assis
Proc
PRC
4 AC

Appearances: Benny Frankie Cerezo. Esq.. San Juan. Puerto Rico. for Instituto de Educacion Universal.

Alexandra Gil-Montero. Esq.. and Russell B Wolff, *Esq.*. Office of the General CounseL United States Department of Education. Washington. D.C.. for Student Financial Assistance Programs.

Before: Judge Richard F. O'Hair

DECISION

On March 12. 1996. the Office of Student Financial Assistance Programs (SFAP) of the U.S. Department of Education (Department) issued a notice of intent to terminate the eligibility of Institute de Educacion_Universal (IEU) to participate in the student financial assistance programs authorized under Title IV of the Higher Education Act of 1965, as amended (Title IV). 20 U.S.C. § 1070 et *seq*. and 42 U.S.C. 1 2751 *etseq*. SFAP also stated its intention to

impose a fine of $275,000. Later in 1996. SFAP commenced two additional proceedings against IEU to recoup S2.762,150 based on its evaluation of a final program review determination and a final audit determination which described statutory and regulatory violations IEU is alleged to have committed. 1 At the request of the parties, these three administrative proceedings were combined into one and a hearing to address them was conducted on October 22 and 23, 1996.

TERMINATION

The Secretary of Education is given broad discretion to terminate or limit the eligibility of an institution to participate in any Title IV programs if the institution violates any provision of Title IV or any regulation which implements that statute. The thrust of the Department's efforts to terminate IEU's eligibility to participate in Title IV student financial assistance programs and to impose a fine is that LEU violated three provisions of Title 1V and its implementing regulations and thus fails to meet the standards of administrative capability and uphold its fiduciary responsibilities. The specific alleged violations are as follows: 1) IEU requested Title IV program funds in excess of its immediate needs: 2) IEU overstated the number of clock hours of instruction it provided: and. 3) IEU failed to make tuition refunds and failed to make timely refunds.

1. The final program review determination for award years 1992-93, 1993-94, and 1994-95 was issued on June 3, 1996 and was assigned Docket No. 96-93-SP. On June 28, 1996. a final audit determination letter for award years 1991-92 1992-93. and 1993-94 was issued and it was assigned Docket No. 96-103-SA.

Excess Cash

Before an institution may begin participation in Title IV financial aid programs, it must demonstrate that it has the administrative capability to adequately administer these programs. 34 C.F.R. § 668.16.[2]

Additionally. such an institution must act as a fiduciary when handling Federal funds which are ultimately to be disbursed to the eligible students. 34 C.F.R. § 668.82. With these guidelines in mind, an institution which participates in the Title IV student aid programs is given the discretion to make withdrawals. or draw downs. of Federal funds from the Department account at such times as funds are needed to disburse to eligible students. The institution is not permitted to draw down funds in excess of its immediate need. and immediate need has been defined as those funds which the institution can expect to disburse to students within an average of three days. 31 C.F.R. § 205.4 a 1988): Recipient's Guide for the Department of Education Payment Management System, Chapter 3. 6 October 1995).[3] If an institution discovers it has funds in excess of this immediate need. it is expected to return them immediately to the

2. All cites refer to the 1994 Code of Federal Regulations, unless otherwise indicated.

3. The Department adopted a formal regulation effective July 31, 1995 which embodies the previously established excess cash limitations. 34 C.F.R. § 668.166 (1995)

Department account. *Id.*

In May 1994 auditors assigned to the Department's Regional Office of Inspector General for Audit (OIG) in New York conducted an audit review of IEU's administration of its Title IV student financial aid programs for the period July 1. 1991, to June 30, 1994. The auditors determined that during the audit period IEU consistently drew down more Federal monies than it could expect to disburse within an average of three days, and monies in excess of its annual authorizations. This finding was based on a review of IEU's funding authorizations for the Pell Grant. Federal Work-Study, Supplementary Educational Opportunity Grant. and Perkins Loans programs. the amounts of the cash draw downs. and the timing and amounts of disbursements for each of these programs. The auditors recorded all of IEU's draw downs and disbursements on a monthly basis for each of the three award years. After subtracting the disbursements from the draw downs, the remaining balance of funds in IEU's accounts represented excess cash held by IEU, or cash held for more than three days.

In the 36 months under evaluation. IEU maintained excess cash balances at the conclusion of every month but October 1991 and March 1993. The highest amount of excess cash balance for any one month was $4,018,150: over the three year period, the average excess cash balance at the end of the month was $1,367,783. In addition to monthly totals, the OIG auditors also prepared a chart. ED Exhibit 48. which lists each draw down of federal funds, each disbursement to IEU's operating account, and a running balance of funds in that account. This chart further details the significance of IEU's excess cash position.

In its September 12, 1995. response to the OIG audit report, IEU admitted that it had a problem with maintaining excess cash during the three award years, but argued that the Department had overstated the problem. both in terms of the amount of excess cash at the end of the 1993-94 award year and in the amount of the

imputed interest due the Department. Despite this earlier admission. during the hearing, IEU challenged this excess cash finding through the testimony of its witnesses. who made assurances that all federal funds were disbursed within three days of their draw down. IEU's witnesses explained that the reason for this OIG finding was that OIG mistakenly believed that the date student aid was posted on the student ledger was the date the funds were paid to the student accounts. In reality, however, IEU stated that student aid funds were properly credited within three days of their draw down, but this event was posted on a later date. In the absence of a Departmental requirement that these ledgers be updated on a daily basis, it was IEU's practice to post these ledger entries several months after a financial event occurred.

Through this testimony, IEU attempted to demonstrate that the reason it was being mistakenly accused of maintaining excess cash in its school accounts was because of the time delay in posting transactions to the student ledger accounts. However, I am not convinced this is true. ED Exhibit 48 provides a picture of IEU's draw downs and disbursements, with a running account balance. This document clearly demonstrates that it was IEU's practice to draw down more Federal funds than it disbursed within a three day. or even longer period. IEU's testimony regarding the timing of the posting of the student ledger accounts dates is irrelevant. and its testimony that all federal funds were credited within three days of a draw down is unpersuasive. Throughout the three award years examined. IEU maintained excess federal funds in its account for longer than three days.

SFAP also alleged that IEU used Title IV funds for unauthorized purposes. In support of this allegation it presented ED Exhibit 49. an OIG work paper. which indicated that by the end of each month most of the funds in IEU's Federal funds account

balance were removed but that the school's operating account balance was not simultaneously increased by the same amounts. SFAP interprets this apparent "disappearance" of Federal funds to be evidence that IEU used these funds for non-program purposes. There is no question that IEU maintained excess cash throughout this period, but I was not provided with sufficient evidence to meet SFAP's burden of proof that the funds were otherwise abused. Therefore. I decline to find that IEU expended Title IV funds for unauthorized purposes.

Overstated Clock Hours

IEU utilizes a clock hour system of measuring the length of its technical programs. For any program measured in clock hours, student eligibility for second and subsequent Pell Grant awards depends upon a student's completion of a prescribed minimum number of clock hours. During the May 1994 audit, the OIG auditors found that IEU was incorrectly computing the number of clock hours assigned to its programs in such a way as to permit students to become eligible for second or subsequent Pell Grant payments sooner than proper.

The issue of how to define a clock hour continues to be a vexing problem for the Department and the subject of much litigation and interpretation.[4]

4. *See In re Denver Paralegal Institute.* Dkt. No. 92-86-SP. 92-87-SA, U.S. Dept. of Education (Mar. 14. 1994). affirmed by the Secretary. Feb. 24. 1995; *In re MBTI Business Training Institute of Puerto Rico.* Dkt. No. 93'147-SA. U.S. Dept. of Education (Apr. 15, 1994).

A clock hour traditionally was defined as a 50-to-60 minute class. recitation or lecture. Because of ambiguities in the' interpretation of this definition. it was further refined in the regulations. The definition applicable to the term ·clock hour beginning with the 1993-94 award year is found in 34 C.F.R.600.2 (1994).

> *Clock hour:* A period of time consisting of-
>
> **(1)** A 50- to 60-minute class. lecture. or recitation in a 60-minute period;
> **(2)** A 50- to 60-minute faculty-supervised laboratory, shop training, or internship in a 60-minute period:

An explanation for this change was addressed by the Secretary of Education in the Federal Register of July 23. 1993.

> To demonstrate the number of clock hours in an educational program , certain institutions have aggregated the number of minutes of instruction provided in that program. and *have* divided those minutes by 50. This practice is inconsistent with the Secretary's long-standing interpretation under the current definition of the term "clock hour." Under that interpretation, if an institution seeks to determine the number of clock *hours in* an educational program by aggregating the number of minutes in that program. it has to divide those minutes by 60 rather than 50.
>
> The revised definition of a clock hour requires that each clock hour of instruction takes place in a discrete 60-minute period. The Secretary believes that this revision, as well as this discussion. should eliminate any further contentions regarding the proper calculation of clock hours. 58 Fed. Reg. 36918 (July 23, 1993).

IEU offers two programs, the day program which runs from 8:00 AM to 1:50 PM and a night program which runs from 6:00 PM to 10:30 PM. The day program is 350 minutes in length and consists of six 50 minute periods of instruction for a total of 300 minutes of instruction and one 50-minute student break. 5 The night program is 270 minutes long and consists of five 50-minute' periods of instruction for a total of 250 minutes of instruction and a 20-minute student break. SFAP argues that. in spite of a change to the regulation in 1993 and Secretarial guidance found in the Federal Register, IEU has persisted in its practice of aggregating the number of minutes of instructional time in the program and dividing the number by 50, rather than 60, to compute the number of clock hours. This practice results in IEU's conclusion that its day program gives the students six clock hours of instruction per day and the night program five clock hours of instruction. SFAP insists that the aggregate hours of instruction be divided by 60, rather than 50, and that IEU's method of computation has resulted in an overstatement of clock hours in its programs and a resultant over award of Pell Grant awards.

[5] Rather than divide its day program classes into the more traditional arrangement consisting of six 50-minute periods of instruction followed by 10-minute breaks, IEU elected to combine the 10-minute breaks from the first five classes and give the students one 50-minute break during the school day which depending on the students' schedules, is injected somewhere between one of the six instructional classes. Similar treatment is given to the 20-minute break for the night program.

Using 60 rather than 50 as the divisor results in the day program offering 5 clock hours of instruction and the night program 4.17 clock hours. versus IEU's calculation of 6 and 5, respectively.

SFAP points out that IEU's use of a 50- rather than 60-minute clock hour resulted in an over award of $3,854,700 in Pell Grants over the three year audit mind. However, because of a previous ambiguity of the definition of a clock hour which SFAP attempted to clarify in 1993. SFAP seeks to recover over awarded funds for only the 1993-94 award year.

IEU justifies its method of determining clock hours by explaining that since its day students receive 300 minutes of instruction a day, and the increments of instruction are divided into 50-minute periods, it is only natural to divide the total number of minutes of instruction by 50 to arrive at the proper number of clock hours. It is adamant about not including non-instructional time in the clock hour computation because to do so would result in a higher fee for its students. There is a certain logical appeal to IEU's arguments on this issue: however, this method has its flaws.

The Department's primary goal is to award Pell Grants to students based upon receiving a specified amount of instruction - a clock hour. This instructional clock hour must not consist of anything less than 50 minutes of class. lecture or recitation: the Department will recognize a 50 minute class, accompanied by a 10-minute non-instructional period, to be the equivalent of one clock hour. The regulation confirmed this when it was amended in 1993 specifically sanctioning the inclusion of up to 10 minutes of non-instructional time within one clock hour. However, in many institutions which offer classes which cover a two. three, or four hour block of time in one session, designed with 10-minute breaks for each hour, the instructor and students frequently decide to reallocate

the 10 minute break periods. This is accomplished by aggregating them either in the middle. or at the conclusion of the class session. The obvious benefit to the choice of the latter option is that the class ends early and the non-instructional period is taken after the students and faculty have departed the facility. This. or any other form of realignment of the non-instructional periods does not deprive the students of any instructional time, as the student has had the benefit of several 50 minute periods of instruction and several 10 minute periods of non-instructional time.

SFAPs failure to include the 50 ´minutes of non-instructional time IEU allows each of its day program students and the 20 minutes of non-instructional time for the night students in the computation of the programs ´clock hours suggests that *the* Department is interested in preventing a school from providing a continuous stream of 50 minute lectures. without the benefit of a break. Perhaps this is premised on the concern for the value of such non-stop class time. If the non-inclusion of non-instructional time in the clock hour computation is based on this theory, then this appears to be a venture by the Department to exercise direction or control over IELJ's curriculum or program of instruction.,which is expressly prohibited. 20 U.S.C. § 3403; *see also* 20 U.S.C. § 1232-a. 5899. The arrangement of instructional and non-instructional class hours is not a Departmental concern. but one within the province of a state licensing body or accrediting agency.

Another theory which SFAP may be pursuing here is its interpretation that the clock hour definition in Section 600.2 requires the 50- to 60 minute class and any resulting 0- to 10-minute -non-instructional time to occur within one consecutive 60 minute period, as opposed to being aggregated as discussed above. If this is SFAP s position, it is based on an ambiguous change to the regulation which leaves the

regulation subject to further contention. Although the Secretary indicates a clock hour of instruction should occur in a "discrete 60-minute period", the regulation is not quite so precise.

Requiring that the non-instructional time immediately follow a distinct 50-minute period of class ignores the realities of the dynamics of classroom behavior involving classes of two or more consecutive hours in length. 6

The problem faced by IEU would have been avoided if it had not aggregated the periods of non-instruction, but rather attached them to the end of each 50-minute segment of lecture. However, I believe it retains this discretion absent a contrary ruling by its accrediting agency or licensing body. Accordingly, I find that IEU has not overstated its clock hours to the extent advocated by SFAP because it should be permitted to use the combined total of its instructional and non-instructional time to arrive at the clock hour figure. After recomputing the clock hours for the day program, I find IEU provides six clock hours of instruction per day as it claims.

6. Under the theory that a 50-minute class and a 10-minute break must occur within a consecutive 60-minute period, one can argue that the auditor's calculation of IEU's clock hours is erroneous because both day and night students had a full 60-minute class/break period for the last class of the session, as well as for the classes both before and after the aggregate 50-minute and 20-minute breaks. Applying 10 minute breaks to each of these three would reduce alleged over awards.

This is based on it providing 300 minutes of class, plus the 50-minute aggregated student break, plus 10 minutes of an imputed break at the conclusion of the school day. This total of 360 minutes is divided by 60, with the result of six clock hours. I find the evening program provides 4.66 clock hours of instruction. This is based upon 250 minutes of class, plus the 20-minute aggregated student break, plus a 10-minute imputed break at the conclusion of the school day. Dividing the total, 280 minutes, by 60 results in a clock hour computation of 4.66 clock hours per day, one-third of a clock hour short of what IEU had allocated for the evening program.

Using my recalculation of IEU's clock hours, there has been no over award for the day program, and an over award of one-third of a clock hour per day for the night program. IEU's financial liability for this reduced over award should be recomputed accordingly.

Untimely Refunds

Institutions which participate in any Tide IV programs are required to have implemented fair and equitable refund policy which arm ides a refund of the unearned portion of

the tuition, fees room and board. and other charges to any student who has received some form of Title IV program assistance and subsequently withdraws. drops out. or is evened after the *first* day of the payment period. 34 C.F.R. § 668.22(a). The institution must return the Title IV program portion of the refund to the appropriate program account within 30 days of the date the student withdrew or dropped out 34 C.F.R. § 668.22(g)(2)(iv) (1994).

From April 18 through 22, 1995, institutional review specialists from the Department's New York Regional Office conducted a program review of IEU's administration of the Title IV

program. The program review cited IEU for having a history of making late refunds to students and to the Pell Grant account. The program reviewers discovered that the cause of most of the late refunds was IEU's admission that its usual practice was to wait until the September following each award year to make refund payments: its method for effecting this refund was to offset the refund against future draw downs from the Pell Grant Statement of Account. As a result. IEU's eligibility for funds would be reduced by the amount of the offset .Based on this finding of late refunds, the program reviewers asked IEU to prepare a report of refunds not made. or made late, to the Pell Grant account for each award year under review. In compliance with this request. IEU compiled an initial list of late or unpaid refunds which disclosed 803 late refunds. totaling 5971,9I4, for the 1992-93 award year: 865 late refunds, totaling S 1,044,454, for the 1993-94 award year; and, as of the time of the review. IEU had failed to make 512 refunds. totaling S655,554, for the 1994-95 award year. All refunds for the 1992-93 and 1993-94 award years had been paid at the time of the program review.

In response to the SFAP claim that [EU owed the Pell Grant account refunds of S655,554 for the 1994-95 award year, the school produced testimony and documents proving that on July 20, 1995, it reduced its authorization for Pell Grant funds by generating an offset of S1,120,192 to its Pell Grant account. IEU argues that this transaction represents a refund, albeit late, of more than double the amount SFAP requested. SFAP disagrees with IEU's conclusion. SFAP confirms that an offset is an appropriate method of paying a refund. but that a reduction of the authorization in a school's Pell Grant statement of account can occur for other reasons as well, such as a reduction in the number of enrolled students. SFAP insists, and I agree, that in this situation a valid refund would have been effectuated only if the reduction of IEU's authorization - was accompanied by a showing that IEU enrolled additional students who were eligible for Pell

Grants, but for which IEU did not draw down federal funds to award than those grants. IEU presented no evidence of its forbearance of the award of additional Pell Grants to match the offset of its authorizations, therefore,

I must conclude that the refund for the award year for 1994- 95 has not been consummated.

Discussion as to Termination

The Secretary has been given the statutory authority to terminate the eligibility for any program under Title IV. of an otherwise eligible institution, if it fails to carry out any regulation prescribed by the Secretary. 20 U.S.C. § 1094{0(1)(D). Pursuant to this authority, the Secretary has promulgated 34 C.F.R. § 668.86(a). which provides that the Secretary may terminate the eligibility of an institution to participate in any or all Title IV programs if the institution violates any provision of Tide IV or any regulation or agreement implementing that Title. In addition, if an institution's regulatory violations result in a breach of its fiduciary duty to administer Tide IV programs in accordance with the highest standard of care and diligence, this conduct also constitutes grounds for termination of eligibility to participate in these programs. 34 C.F.R. § 668.82(c).

During the award years under consideration, IEU consistently engaged in conduct which was contrary to the Title IV regulations and regularly ignored policy guidance regarding its obligation to properly estimate the amount of Federal funds needed for a three day period of operation. thus allowing it to maintain excess Federal funds in its school account in violation of regulatory prohibitions designed to prevent this situation. Additionally, IEU failed to make timely refunds, and for the 1994-95 award year failed to make refunds at all, to students and/or the Pell Grant account for students who withdrew, dropped out, or were expelled from

the institution: Based upon the credible evidence of these regulatory violations.

SFAP has shown to my satisfaction that IEU lacks the administrative capability to administer Title IV programs and that it has also failed to act in a manner consistent with its fiduciary duty. I find IEU's failure of its duties in these two critical areas warrants termination of its eligibility to participate in the Title IV programs. 7

ASSESSMENT OF FINES

In conjunction with its efforts to terminate IEU's eligibility to participate in Title IV programs. SFAP also proposes to fine IEU $275,000, arguing that the violations described above were volitional repetitive and of a most serious nature. The Secretary has the authority to impose a fine on an institution of up to 525.000 for each violation of a statutory or regulator/ provision. 34 C.F.R. § 668.84(a). In assessing this fine. the gravity of the violations should be considered. as well as the size of the school. 34 C.F.R. § 668.92(a). The seriousness of the violations will be addressed below, and I find this is not a small school.

[7] *In re Allied Schools of Puerto Rico.* Dkt No. 94-125-ST, U.S. Dep't of Education (Mar. 23. 1995), aff'd by the Secretary Sept. 18. 1995).

For IEU improperly requesting more fund than it needed for immediate disbursement. SFAP seeks a fine of $75,000. This amount is based on a fine of $25,000 for each of the three award years of the violations. 8 The gravity of IEU's retention of these excess Federal funds throughout the three year period warrants approval of $75.000, the maximum amount of this fine. In conjunction with the excess cash situation.

SFAP also seeks a fine of $75,000 for using the excess Federal funds for unauthorized purposes over the period of the three award years. SFAP did not prove this allegation, so no fine is appropriate for this finding.

SFAP is seeking a fine of $25,000 for IEU's overstatement of clock hours of instruction for award year 1993-94 and an additional S25.000 for the award of excess Pell Grant funds to its students as a result of overstating these same clock hours. Having found the overstatement of clock hours of instruction is significantly less than advocated by SFAP. no fine is appropriate for this finding.

For failure to make refunds and failure to make timely refunds, SFAP seeks a fine of $75,000, based on $25,000 for each award year´s violations. Once again, treating all late refunds occurring in each award year as one separate violation, I find that a fin of $25,000 for each year for a total fine for this finding of S75.000 is appropriate. considering the disregard shown by IEU for regulations requiring a more timely payment of refunds.

8 SFAP treats the excess cash violations occurring in an award year as one violation, rather than attempting to find a violation for each excess cash incident or occurrence.

In conclusion. I find that a total fine of S150.000 for IEU's misconduct is appropriate.

ASSESSMENT OF PROGRAM LIABILITIES

In addition to the termination proceeding initiated under 34 C.F.R. Part 668, Subpart G. this hearing also addressed SFAP's efforts to assess liabilities against IEU pursuant to 34 C.F.R. *Part 668.* Subpart H. based on a final program review determination issued on June 1 1996, and a final audit determination issued on June 28, 1996. This assessment of liabilities relates to the same determinations as were made in the termination proceeding, that is. IEU's maintaining excess cash, failure to make Federal Pell Grant refunds and failure to make refunds in a timely manner, overstating clock hours of instruction, and, although not included in the Subpart G proceeding, IEU's failure to accurately verify information submitted by one student.

For IEU's consistent maintenance of excess cash during the three award years. SFAP has assessed a liability of S756,864. This amount represents S213,917 for the imputed interest on these excess funds which were held by IEU in its account rather than returning them to the Federal account upon the realization that it had in excess of three days need. It also includes S542.947 which represents the amount of excess cash remaining in IEU's Federal account at the conclusion of the three year Program review period. I find that IEU must reimburse SFAP for both amounts.

Although I have found that did not overstate its clock hours for the students in the day program for the 1993'94 award year, there is an overstatement of one-third of a clock hour per day for the students enrolled in its night program. IEU must recalculate the Pell Grant awards for the night students and

reimburse SFAP for any resulting over awards. Additionally IEU must recalculate the number of clock hours for bath programs for the 1994-95 award year, using the same formula as used for the 1993-94 award year, and then recalculate the Pell Grant awards accordingly. IEU must reimburse SFAP for any resulting 1994-95 over awards.

I have confirmed SFAP's finding that IEU made 1,668 late refunds for the 1992-93 and 1993-94 award year and the total dollar value of these late refunds of S2,016,368. For these late refunds. SFAP is entitled to recover the interest on those late refunds at a rate of 3 percent per year. SFAP has computed this as $15.544 for 992-93 and S18.427 for 1993-94. Additionally, I agree *with* SFAP's assertion that it is entitled to a refund from IEU of $655.554 which was due for the 1994-95 award year, along with interest of S23.561.

During the 1995 program review, it was discovered that IEU failed to conduct verification of information submitted by student number 27. IEU has not submitted satisfactory evidence to rebut this finding; therefore, it must repay SFAP the $2300 in Title IV funds paid to that student

FINDINGS

1. IEU consistently maintained program finals in recess of its needs and must reimburse the Department $756,864 for those excess funds and their costs.

2. IEU did not overstate the number of clock hours in its day program for the 1993-94 award year. It must recalculate the Pell Grant award for its 1993-94 night program, as well as both programs for the 1994-95 award year, and reimburse the Department for the over awards in Federal Pell Grant funds.

3. IEU failed to make timely refunds to the Pell

Grant program for the 1992-93, 1993-94, and 1994-95 award years and must reimburse the Department 562,532 in imputed interest costs of those late refunds. Further. IEU must reimburse the Department S655,554 for its failure to make a retired payment for the 1994-95 award year.

4. IEU must reimburse the Department S2.300 for its failure to verify the excess funds for student number 27.

ORDER

On the basis of the foregoing, it is hereby ORDERED that the eligibility of Instituto de Educacion Universal to participate in the student financial assistance programs authorized under Title IV of the Higher Education Act of 1965 be terminated: that it pay a fine of $150,000: and that it reimburse the Department $1,477,230.

Richard F. O'Hair

Judge Richard F. O'Hair

Dated: January 24, 1997

(iii) Order on rehearing

First Circuit's Order of August 5, 2008 denying and striking "Motion For Conversion of the Motion Requesting Court To Clarify Its Order Into A Motion For Panel Rehearing and/or Rehearing En Banc".

United States Court of Appeals
For the First Circuit

No. 06-1562

ANGEL RUIZ-RIVERA, ET AL.,

Plaintiffs, Appellants,

v.

U.S. DEPARTMENT OF EDUCATION, ET AL.,

Defendants, Appellees.

Before

Lynch, Chief Judge,
Torruella and Selya, Circuit Judges.

ORDER OF COURT

Entered: August 5, 2008

Currently pending in the above-numbered appeal are (1) the motion of Angel Ruiz-Rivera asking that this court clarify its order of April 30, 2008 denying his motion reconsideration and (2) a request that we convert the motion for clarification into a motion for rehearing and for a stay of mandate. However, and as noted before, since appellant is not a proper party to this appeal, these motions must be stricken.

So ordered.

By the Court:

/s/ Richard Cushing Donovan, Clerk.

First Circuit's Order of October 10, 2007 denying and striking petition of Co-Plaintiff, and signatory of the Notice of Appeal, Ruiz Rivera, for rehearing and rehearing en banc and for disqualification

United States Court of Appeals For the First Circuit

No. 06-1562

ANGEL RUIZ-RIVERA, ET AL.,

Plaintiffs, Appellants,

v.

U.S. DEPARTMENT OF EDUCATION, ET AL.,
Defendants, Appellees.

ORDER OF COURT

Entered: October 10, 2007

Currently pending in the above-numbered appeal are (1) the petition of Angel Ruiz-Rivera, appearing pro se, for rehearing and rehearing en banc, and (2) Ruiz-Rivera's motion, also filed pro se, to disqualify this court from considering any matters. concerning Ruiz-Rivera or Instituto de Educacion Universal (IEU). Ruiz-Rivera, however, was dismissed as party to this appeal on November 9, 2006, and the pending petition and motion do not raise any challenges to this dismissal. Moreover, since a lay person may only represent himself, Ruiz-Rivera cannot file any;petitions or motions on behalf of IEU. We therefore have no basis upon which to rule on either matter, and we therefore order both the petition and the motion stricken.

By the Court:

(iv) Judgment sought to be reviewed

First Circuit's Judgment of May 11, 2007 Summarily affirming the district court's denial of its motion for relief of judgment, filed under Fed. R. Civ. P 60(b).

United States Court of Appeals
For the First Circuit

No. 06-1562

INSTITUTO DE EDUCACION UNIVERSAL,

Plaintiff, Appellant,

ANGEL RUIZ-RIVERA,

Plaintiff,

v.

U.S. DEPARTMENT OF EDUCATION, ET AL.,

Defendants, Appellees.

Before

Torruella, Circuit Judge,
Selya, Senior Circuit Judge,
and Lynch, Circuit Judge.

JUDGMENT

Entered: May 11, 2007

Appellant Instituto de Educacion Universal (IEU) appeals from the district court's denial of its motion for relief from judgment, filed under Fed. R. Civ. P. 60(b). After carefully considering the parties' briefs and the record, we can see no error in this ruling. First, and even assuming that the district court never considered the motion's merits, the motion would have had to have been denied since it merely rehashed the issues that the court already had resolved. See United States v. One Rural Lot No. 10.356,

238 F.3d 76, 78 (1st Cir. 2001) (per curiam) ("A motion for relief from judgment cannot be used merely to reargue a point already decided") (internal quotation marks and citation omitted). Second, all of IEU's appellate arguments concerning why Rule 60(b) relief was warranted are, in reality, aimed at the merits of the petition for review. It therefore is plain that IEU is attempting to use this pending appeal as "a surrogate for a seasonable appeal of the underlying judgment." See Karak v. Bursaw Oil Corp., 288 F.3d 15, 19 (1st Cir. 2002). Appellant cannot do this. Id.

Summarily affirmed. See Local Rule 27.0(c).

By the Court:

Richard Custting Donovan, Clerk.

(v) Material required by 1(f),(g)

(vi) Other material the petitioner believes essential to understand the petition

Exhibits of Appendix VI

VI-1 Letters from USDE Compliance and Enforcement Director and U.S. attorney certifying IEU had not lost its eligibility.

VI-2 Collection notices by the USDE and the IRS.

VI-3 Pertinent excerpts of Ruiz Rivera's November 8, 2004 Injunctive Relief Petition where he advanced that the Plaintiffs intended to appeal if injunction was not granted.

VI-4 Higher Education Act (HEA) of 1965 as amended clause which was introduced with the FRCP 60 b Motion and that expressly proscribed the application of the regulation for the year upon which the clock hour "finding" was upheld.

VI-1. Letters from USDE Compliance and Enforcement Director and U.S. attorney certifying IEU had not lost its eligibility.

UNITED STATES DEPARTMENT OF

WASHINTON. D.C. 20202-

MAY 30
1997

Ms. Lori Marty
Great Lakes Higher Education Corporation 2401
International Lane
Madison, WI 53704-3192

Re: Instituto de Educacion Universal,

Puerto Rico - OPE: 02316400 Dear Ms.

Marty:

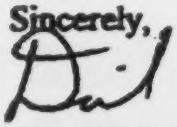
On February 19, 1997, this office faxed you a copy of the initial administrative decision in the matter of Instituto de Educacion Universal, Puerto Rico (IEU) and the U.S. Departinent of Education (Docket Nos. 96-28-ST, 96-93-SP, and 96-103-SA). The cover letter indicated that both parties planned to appeal the decision.

Please be advised that on April 4, 1997, Student Financial Assistance Programs (SFAP) appealed the decision to the Secretary of the U.S. Department of Education (Secretary). IEU appealed the decision to the. Secretary on February 28, 1997. Although the initial decision was to terminate IEU from participating in the Title IV programs, during the appeal process, the school remains eligible to

participate in these programs. 34 C.F.R. § 668.90.

If you have any further questions, please contact Amy Freireich at (202)-708-6046.

Sincerely,



David L. Morgan
Director
Administrative

U.S. Department of Justice

GUILLERMO GIL
United States Attorney's Office
District of Puerto Rico

June 2, 1997

VIA FACSIMILE AND REGULAR MAIL

Benny Frankie Cerezo, Esq.
848 Hostos Avenue
Hyde Park
Rio Piedras, Puerto Rico 00927-4216

Re: Josefina Quinones Garcia v.
United States Civil No. 97-1722 (HL)

Dear Mr. Cerezo:

Enclosed find copy of the letters the Department of Education sent to Great Lakes Higher Education Corporation and United Student Aid Funds (USAF). These letters show that the Injunction you filed on behalf of Josefina Quinones is premature since I.E.0 has not lost its eligibility in Title IV programs.

The government will not oppose to a voluntary dismissal of the Injunction.

Please advise within the next five (5) days, if you will voluntary dismiss the complaint, if not the defendant will then file a Motion to Dismiss.

Cordially,

GUILLERMO GIL
United States Attorney

S Isabel Munoz Acosta
Assistant U.S. Attorney

VI-2. Collection notices by the USDE and the IRS.

DEPARTMENT OF TREASURY
FINANCIAL MANAGEMENT SERVICE
BIRMINGHAM, AL 35283-0794

December 22. 1998

Financial Officer. Instituto De Educacion Universal
Mr. Angel Rivera, President
404 Avenida Barbosa
Hato Rey, PR 00917

DMSC Account Number: 990011062-121626

Dear Financial Officer:

This is to advise you that your unpaid delinquent debt owed to the Department of Education has been referred to the U.S. Department of the Treasury for collection. According to the Department of Education's records, you owe $20,911,099.98 to the United States Government.

Aggressive legal collection action will commence against you unless you make payment in the amount of $25,540,968.50, which includes all administrative fees and applicable interest, within ten (10) days of the date of this letter.

If you wish to avoid the pending collection measures being prepared to collect your debt, you must immediately send your check or money order, made payable to the U.S. Treasury. To ensure proper credit to your account, include the account number in the memo section of your check, and forward the check with the enclosed PAYMENT COUPON to:

U.S. Department of the Treasury — FMS Debt Management Services
P.O. Box 105576

sure

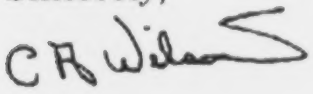
Atlanta, GA 30348

Correspondence should be directed to:

Debt Management
Servicing Center (TRFM)
Post Office Box 830794
Birmingham, AL 35283-0794

If you are unable to pay your debt in full, please contact Sharon Carter at (888) 826-3127 immediately.

Sincerely,



Charles A. Wilson
Debt Management Services

VI-3. Pertinent excerpts of Ruiz Rivera's November 8, 2004 Injunctive Relief Petition where he advanced that the Plaintiffs intended to appeal if injunction was not granted.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO I

INSTITUTO DE EDUCACION UNIVERSAL

V. 98'2225RLA

U.S. DEPARTMENT OF EDUCATION

INJUNCTIVE RELIEF PETITION

To the Honorable Court (HC):

Comes now the Plaintiffs', Angel Ruiz Rivera (ARR), appearing here on his own right (Pro Se); In Forma Pauperis (IFP), and in representation of IEU, 1 the defunct since 1998 legal fiction and respectfully states, alleges and prays as follows:

I. Introduction

1. Recently, on October 26, 2004, this HC issued a summary judgment order and opinion in the above referenced case after having been filed more than six (6) years ago.

2. Most recently, the appearing counsel for the Plaintiffs has moved to resign due primarily to the Plaintiffs incapacity to pay the legal firm the tens of thousands of dollars in honoraria owed, due to our IFP economic status.

Pursuant to the authority of the previous cases where ARR has temporarily represented IEU while *he retains counsel for* the defunct legal fiction. See 99-1328 and 99-1628. According to the rationale of the First Circuit in allowing my representation temporarily by way of exception, this appearance of an officer in representation of an entity is accepted in circumstances such as this where there is too *short time* to *file a motion for reconsideration* under Federal Rule of Civil Procedure 59. (10 days) and this coincides with the resignation of the preexisting legal

representation.

...

...

...

...

...

possibility of being able to retain and pay counsel to defend itself from all *these* clearly unripe unconstitutional and illegal actions since it left it totally devoid of economic resources. This is one of the reasons why IEU has been obliged to appear through its President, Pro Se, in various stages of this litigation since the onset, starting at the administrative hearings level.

7) Actually, because as we all know, the decision of this court is still not final, and we

intend to appeal it if this injunctive relief petition is not granted, we are respectfully requesting from this HC to order from the USDE the immediate release of all the pre-confiscated funds so that IEU can have economic resources to avail itself of its right to representation by counsel of its choice, a right that was preconfiscated from it by the USDE by the taking of all its property without evidently complying with basic due process. We request that from these funds, the debt owed to the previous lawyers that have represented IEU in this litigation are paid, just as the present and future ones, until this judicial review process is final and over, including any future counsel that this HC may choose to appoint for IEU due to its insolvency and the determination of this HC that its President, Angel Ruiz *Rivera* (ARR) cannot *represent* it Pro Se. This, in case my appearance for IEU is not accepted or if I die for whatever reasons. In the alternative, we pray that this HC appoints a judicial administrator of these funds who would pay the legal honoraria, fees and costs

and any other incidental cost of the rest of this litigation including appeal and any other expenditure that this HC may in time approve.

8) Very respectfully, we are also requesting that this HC orders the USDE to comply with the Notice of Levy of June 17, 1998, timely filed by the Internal Revenue Service (IRS) of the U.S. Department of the Treasury (USDT) against the USDE funds owed to IEU (Exhibit 5), since this credit of the IRS has preference in rank and in time over any credit that the USDE may

VI-4. Higher Education Act (HEA) of 1965 as amended clause which was introduced with the FRCP 60 b Motion and that expressly proscribed the application of the regulation for the year upon which the clock hour "finding" was upheld.

(B) by March 1: proposed modifications and updates pursuant to section 478 published in the Federal Register;
(C) by June L final modifications and updates pursuant to section 478 published in the Federal Register;
(D) by August 15: application for Federal student assistance and multiple data entry data elements and instructions approved;
(E) by August 30: final approved forms delivered to servicers and printers;
(F) by October 1: Federal and multiple data entry forms and instructions printed; and
(G) by November 1· Federal and multiple data entry forms, instructions, and training materials distributed.
(2) Allocations of campus-based and Pell Grant funds—
(A) by August 1: distribution of institutional application for campus-based funds (FISAP) to institutions;
(B) by October 1: final date for submission of FISAP by institutions to the Department;
(C) by November 15: edited FISAP and computer printout received by institutions;
(D) by December 1: appeals procedures received by institutions;
(E) by December 15: edits returned by institutions to the Department;
(F) by February 1: tentative award levels received by institutions and final Pell Grant schedule;
(G) by February 15: closing date for receipt of institutional appeals by the Department;
(H) by March 1: appeals process completed;
(I) by April 1: final award notifications sent to institutions; and

(J) by June 1: Pell Grant authorization levels sent to institutions.

(b) TIMING FOR REALLOCATIONS—With respect to any funds re- allocated under section 413D (e), 442(e), or 482(j), the Secretary shall reallocate such funds at any time during the course of the year that will best meet the purpose of the programs under subpart 3 of part A, part C, and part E, respectively. However, such reallocation shall occur at least once each year, not later than September 30 of that year.

(c) DELAY OF EFFECTIVE DATE OF LATE PUBLICATIONS.-**Any regulatory changes initiated by the Secretary affecting the programs pursuant to this title that have not been published in final form by December 1 prior to the start of the award year shall not become effective until the beginning of the second award year after such December 1 date.** For award year 1994-95, this subsection shall not require a delay in the effectiveness of regulatory changes affecting parts B, G, and H of this title that are published in final form by May 1, 1994.

(d) NOTICE TO CONGRESS. --- The Secretary shall notify the Committee on Labor and Human Resources of the Senate and the Committee on Education and Labor I of the House of Representatives when the items specified in the calendar have been completed and provide all relevant forms, rules, and instructions with such notice.

NO. 08A883

IN THE SUPREME COURT OF THE UNITED

STATES

ANGEL RUIZ RIVERA AND
INSTITUTO DE EDUCACION UNIVERSAL
PETITIONERS

V.

UNITED STATES DEPARTMENT OF
EDUCATION
RESPONDENT

PROOF OF SERVICE

I Julio C. Morillo, Esq. do declare that on this date, July 6, 2009, as required by Supreme Court Rule 29 I have served a copy of the enclosed Petition For Writ of Certiorari on; Office of the Solicitor General of the U.S. Room 5614, Department of Justice, 10th Street and Constitution Avenue N.W. Washington, DC 20530 by depositing an envelope containing the above documents in the United States Mail properly addressed and with first-class postage prepaid .

Julio Morillo Limardo, Esq.
U.S.D.C. D.P.R. #130811
U.S.C.A. 1.C. #82774
Avenida Betances I-17
Hermanas Davila,
Bayamon, P.R.00959.
(787)485-5437

(2)

09-112

IN THE SUPREME COURT OF THE UNITED STATES

ANGEL RUIZ RIVERA AND
INSTITUTO DE EDUCACION UNIVERSAL

PETITIONERS

V.

UNITED STATES DEPARTMENT OF EDUCATION

RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR REHEARING

APPELLANTS BRIEF

JULIO MORILLO LIMARDO, ESQ.
AVENIDA BETANCES I-17
HERMANAS DAVILA
BAYAMON, P R. 00959.
787-485-5437

QUESTIONS PRESENTED

Whether this Court should condone or acquiesce to the fact that the Federal Rule of Civil Procedure 60 B Motion was never evaluated on its merits by neither the district nor the circuit courts and that ergo, the new evidence produced which totally exonerated the Petitioners was never taken into consideration?

Whether this Court should condone or acquiesce to the forfeiture of Co-Petitioner's Angel Ruiz Rivera's standing to continue appearing in his appeal of the FRCP 60 (b) Motion denied especially when he suffered personally the quintessential injury-in-fact by the Internal Revenue Service (IRS) by imputing Trust Fund Liabilities over him personally as the person responsible for IEU's tax debt?

Whether this Court should condone or acquiesce to the fact that the courts below erred by allowing CoPetitioner to represent the corporation for many years, against the stare decisis of this Court which forbids same?

LIST OF ALL THE PARTIES

The Petitioners are: Angel Ruiz Rivera and Instituto de Educacion Universal (IEU).

The Respondent is the U.S. Department of Education (USDE).

CORPORATE DISCLOSURE STATEMENT

I Julio Morillo Limardo, Esq., appearing here for IEU, hereby certify that there is no parent corporation, or publicly held company owning 10% or more of the corporation's stock.

TABLE OF CONTENTS

1. Questions Presented.....3

2. List of All the Parties.....4

3. Corporate Disclosure Statement.....4

4. Table of Contents.....5

5. Table of Authorities.....6

6. Citations and the Official and Unofficial Reports of the Opinions and Orders Entered in the case by the Courts.....7

7. Statement of the Basis for Jurisdiction.....8

8. The Constitutional Provisions, Treaties, Statutes, Ordinances and Regulations involved in the case.....8

9. Concise Statement of the Case.....9

10. Direct and Concise Argument.....13

11. Conclusion.....20

TABLE OF AUTHORITIES

CASES

Devlin v. Scardeletti, 536 U.S. 1(2002).....10

Grace v. Bank of Leumi, 04-5824

(2nd.Cir. 2006).....19

Rowland v. California Men's Colony, 113 S.Ct. 716 (1993).....19

STATUTES

28 U.S.C. 1254.....8

28 U.S.C. 1331.....8

Higher Education Act (HEA) of 1965 as amended, 28 U.S.C. 1070 et seq. 13

U.S. CONSTITUTION

Fifth Amendment.....9

Sixth Amendment 12

CITATIONS AND THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THE CASE BY THE COURTS

U.S. Supreme Court Order of April 13, 2009 granting application fro extension of time to file Petition.

First Circuit's Order of December 2, 2008 denying and striking motion for court to rule on rehearing filed by Co-Plaintiff and signatory of Notice of Appeal Angel Ruiz Rivera.

First Circuit's Order of August 5, 2008 denying and striking "Motion For Conversion of the Motion Requesting Court To Clarify Its Order Into A Motion For Panel Rehearing and/or Rehearing En Banc".

First Circuit's Order of April 30, 2008 denying and striking Co-Plaintiff and signatory of the Notice of Appeal, Ruiz Rivera's "Motion For Reconsideration" of Order dismissing him as a party.

First Circuits Order of October 10, 2007 denying and striking petition of Co-Plaintiff, and signatory of the Notice of Appeal, Ruiz Rivera, for rehearing and rehearing en banc and for disqualification

First Circuit's Judgment of May 11, 2007 Summarily affirming the district court's denial of its motion for relief of judgment, filed under Fed. R. Civ. P 60(b).

Order of the District Court of January 18, 2006, ruling that □ This case is under appeal.□

Judgment of the District Court, of October 26, 2004.

ADMINISTRATIVE DECISIONS PETITIONED TO BE REVIEWED

Order of the Secretary of January 9, 1998 of the USDE Secretary affirming his final agency decision

Decision of the Secretary of October 28, 1997.

Decision of the USDE Administrative Law Judge (ALJ) of January 24, 1997

STATEMENT OF THE BASIS FOR JURISDICTION

Jurisdiction of this Court is authorized by 28 U.S.C. 1254.

Jurisdiction in the court of first instance was authorized by 28 U.S.C. 1331.

THE CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED IN THE CASE.

First Amendment.

Fourth Amendment.

Fifth Amendment.

Sixth Amendment.

Higher Education Act (HEA) of 1965 as amended, 28 U.S.C. 1070 et seq.

CONSICE STATEMENT OF THE CASE

Petitioners Angel Ruiz Rivera and Instituto de Educacion Universal (IEU) are appearing here through the undersigning counsel after having struggled for more than fourteen (14) years for a day in court in this federal judicial system, heretofore to no avail. As a result, we are hereby imploring the members of this U.S. Supreme Court (Court), to provide for Justice in this controversy where 5,000 students and 500 employees were negatively affected plus Ruiz Rivera and his family. There are various reasons why the Honorable Justices of this Court should be persuaded that it is in the best interests of Justice to grant this petition for rehearing and consider the petition for certiorari on its merits.

The first reason is that Co-Petitioner Ruiz Rivera was forfeited of his Fifth Amendment due process rights to continue to appear as a party in the appeal below before the U.S. Court of Appeals for the First Circuit (USCA1C), after having litigated before it for more than eleven (11) years.

The mere fact that this Co-Petitioner, who was not only a named party, but the main plaintiff, plus the filer and signatory of the Notice of Appeal upon which the USCA1C took the appeal, was left out of same, is in direct conflict with the decisions of at least eight (8) Circuit Courts [1], including most notably the own USCA1C.

---

[1] See cases in the Petition for Certiorari at pp. 23-24.

The mere fact that the USAC1C in the appeal below decided in a manner contrary to its own precedent, denote an untenable disparate treatment and incongruence, tantamount to a bias and prejudice that this Court should not condone or acquiesce to.

Nevertheless, what is still more significant is that the USCA1C decision to forfeit the standing of this Co-Petitioner is contrary to the ruling of this own Court in Devlin v. Scardelleti, 536 U.S. 1, (2002,) where you went as far as to allow non-parties to a controversy to appear on the appeal of same, simply because they were negatively affected by it, as mere reason and logic dictate, besides elementary principles of Equity and Justice. With regards to this strictly legal issue, on that cited opinion, you admonished that:

We have never, however, restricted the right to appeal to named parties to the litigation. (Emphasis supplied). (Citations omitted).

For the above stated reasons, without more, the members of this Court have here a formidable and unique opportunity to establish policy and make a ruling regarding this strictly legal issue as to what should be the limits to the extension of the standing to appear in the appeal of a controversy by a litigant negatively affected by its decision especially in cases such as in the one in this controversy where the litigant proactively prosecuted his action before the district and circuit courts for over eleven years and was the filer of the Notice of Appeal upon which the Circuit Court acted.

The second reason why the members of this Court should be persuaded that this petition for rehearing should issue just as the certiorari is that Ruiz Rivera's standing should not had been forfeited also because as a direct result of the Respondents' unconstitutional, illegal, wrong and/or negligent actions, the Internal Revenue Service (IRS), determined that Ruiz Rivera is the person responsible for the unpaid taxes of Co-Petitioner Instituto de Educacion Universal (IEU). This determination resulted in the imputation of Trust Fund Liabilities (TFL's) against Ruiz Rivera personally for over $336,000, back in 1997, that to this date, amount to over $1 million dollars, with the interests accrued.

As the Honorable Justices of this Court must at least concur with, the imputation of TFL's constitute the quintessential injury -in-fact that a citizen of this otherwise Great Republic can suffer from the Government, since it negatively affects the person responsible for the taxes until they are paid and they are not dischargeable even through a personal bankruptcy.

For the above stated reasons only, without more, this Court has more than enough reasons to be persuaded to grant this petition for rehearing in consideration of the fact that the USCA1C's forfeiture of this Co-Petitioner's standing to continue to appear in his own appeal, after he was found to be the person responsible of the IRS imputed TFL's, is an anathema to this Constitutional system of law.

With all due respect, if this Court were to uphold the decisions in this controversy as they remain so far, it would be not only validating a grave injustice against the Petitioners, but it would be condoning or acquiescing to grave injustices like the ones here where citizens negatively affected by overzealous and/or incompetent Government officers, acting ultra vires under the color of authority, may not even defend themselves from atrocities like the ones committed here with total impunity. This should not be the case, at least in this U.S. of A..

This Court should not underestimate the fact that in the events that transpired which led to the controversy below there were egregious violations of Constitutional rights, Civil rights, Statutory rights, Regulatory rights and Ethical canons, by the Respondents, which included, among others: ultra vires actions against the express language in the applicable law, intimidation of witnesses, suborned perjury, malicious suppression of exonerating evidence, obstruction of justice, fraud upon the courts, ergo, an abuse of the legal process.

In order to adequately explain to this Court the evidently obvious injustices that precede this petition, it is necessary to inform the background of the controversy below which led to the 06-1562 appeal. Only after considering all the facts, the applicable law and regulations, the controlling jurisprudence and the sui generis circumstances you would be able to make an informed decision and

consequently provide for Justice, which is after all, your reason d'etre.

Direct and Concise Argument

Co-Petitioner Angel Ruiz Rivera, was president-founder of the non-profit corporation Instituto de Educacion Universal (IEU), President of its Board of Trustees, Chief Executive Officer, and signatory of the Program Participation Agreement with the U.S. Department of Education (USDE) for the administration of the Higher Education Act (HEA), Title IV, Student Financial Aid Programs that were object of pseudo-audits by the USDE's Office of the Inspector General (OIG) and its Institutional Review Branch. These pseudo-audits resulted in "findings" that were against the law, contrary to the evidence, fraudulently manipulated as a result of which the controversy below was filed which led to this and related litigation that has us still here begging for a day in court, not to say Justice altogether. Among the exonerating evidence maliciously suppressed you find most saliently: 1) A Quality Assurance Review Team Report (QARTR) issued by the best experts in the USDE-OIG that criticized the "findings"; and 2) the expulsion of the OIG's Auditor In Charge as result of his flaws in the audit.

Despite the fact that Ruiz Rivera is a lay person, he was allowed to appear Pro Se and in representation of IEU before the USDE-Administrative Law Judge (ALJ), without the objection of the USDE legal counsels. This

appearance was prompted by the loss of all the financial resources to pay legal honoraria. That financial incapacity was worsened when in February 1997, while the ALJ decision was not final, much less firm, the USDE unconstitutionally preconfiscated over $2.263 million dollars it owed the Petitioners, which incidentally the USDE officers had deliberately delayed in disbursing abusing of all sort of dilatory tactics. This evidently obvious taking of property without due process has remained condoned by all the courts below even to the prejudice of the own IRS which in June 1998 issued a Notice of Levy that related back to taxes owed in 1995. Due to this retroactive effect this levy was legally first in time, consequently first in right, to whatever rights the USDE may some day have, if any. Ergo, the USDE preconfiscated funds that legally pertain to the IRS instead.

Ruiz Rivera was also allowed to appear for IEU in related controversy 96-1893 (JAF) before the U.S. District Court for the District of P.R. (USDCDPR). This was a Constitutional Torts, Civil Rights action and Bivens Complaint that he promoted against USDE officers, for their unconstitutional and illegal actions provoked by their discrimination on account of ethnicity.

Ruiz Rivera was allowed to appear for IEU in the first appeal of 96-1893(JAF) before the U.S. Court of Appeals for the First Circuit (USCA1C), 97-2205, and on its second one 99-1398. He was later allowed to file before the USCA1C, Pro Se and in representation of IEU, the initial petition for judicial

review of the final USDE decision, together with an application to appear In Forma Pauperis (IFP) which was granted. See 98-1242.

When that petition to the USCA1C was transferred to the USDCDPR, Ruiz Rivera was again allowed to file for IEU. See 98-2225(RLA). When that petition was railroaded [3] for the first time, he timely filed the Notice of Appeal on behalf of both. See 99-1628. When in 2000, appeals 99-1398 (of the Constitutional, Civil Rights and Bivens action) and 99-1628 (of the petition for judicial review of the final USDE decision) were consolidated by the USCA1C, he was even allowed to appear in the oral argument.

The net result of the USCA1C decisions on those appeals were contradictory and irreconcilable. While the railroading of the Constitutional Torts, Civil Rights violations and Bivens Complaint, (99-1398), was affirmed, simultaneously, the railroading of 99-1628 was remanded. In the petition for rehearing en banc of 99-1398, which he was allowed to file for both, he timely signaled to the USCA1C that it did not make any sense legally nor in reason or logic for the USCA1C to uphold the pre-exoneration of wrongdoing by the federal officers Defendants in 96-1893 (JAF), (appeal 99-1398), if the petition for judicial review of their actions was been simultaneously remanded to the USDCDPR for

---

[3] We use the term railroaded or railroading because in over fourteen years of the instant and related controversies there has not been even a single hearing, or a day in court, much less a full blown trial on the merits.

evaluation on the merits in 99-1628. The Circuit Court upheld this contradiction and incongruence which is one of the reasons why these irreconcilable rulings have continued to haunt us all to this point.

What is more pertinent and relevant to the instant petition is the fact that after years litigating Pro Se for himself and also for the corporation, during the above appeals' processes, for the first time, the U.S. Attorneys raised as an objection the issue that the Notice of Appeal filed on behalf of both, should not be allowed. The USCA1C responded rejecting this objection. See Instituto de Educacion Universal v. USDE, 209 F.3d 18 (1st Cir. 04/12/2000).

After the remand of 99-1628 in April 2000, since nothing evolved, Ruiz Rivera again filed the Complaint seeking the judicial review of the final USDE decision and it was initially acted upon by the USDCDPR. It was not until then that at the eleventh hour, the U.S. Attorneys finally objected [4] to his appearance for IEU, based on the allegation that he had supposedly withdrawn same in appeal 99-1628, at the juncture when he had complied with the USCA1C orders to retain counsel for IEU.

When 98-2225(RLA) was eventually railroaded for the second time, after almost five (5) years after the April 2000 USCA1C remand, he

[4] Up until then for may years they did not object to Ruiz Rivera's appearance for the corporation since it was very accommodating and convenient for them to continue litigating as they had being, against a non-lawyer, lay person, Pro Se, IFP litigant.

again filed the Notice of Appeal for both IEU and himself based on the law of the case, cited before, where the own USCA1C had decided that a corporation officer could file the Notice of Appeal on behalf of the corporation.

The appeal before the USCA1C that ensued, (05-1775), was unjustly ruled as having been filed late. It was admittedly filed late but only because when 98-2225(RLA) was railroaded again, the then appearing legal counsels immediately filed a motion for resignation of representation based on lack of payment of past due honoraria. The USDCDPR did not grant same motion leaving Petitioners in a sui generis "Catch 22" situation by being left with counsel de jure but not de facto. By denying this more than justified motion to resign, since they could not be obliged to work without pay, the Petitioners were inhibited from filing the Notice of Appeal due to the prohibition of hybrid representation by legal counsel and Pro Se simultaneously.

In the petition for rehearing en banc of appeal 05-1775, we raised as part of our arguments the fact that this litigant had timely filed an Injunctive Relief Petition (IRP) requesting the USDCDPR to order the USDE to release the funds that had been preconfiscated while the USDE's ALJ decision was timely appealed and consequently without the USDE having had a final much less a firm judgment upon which to justify such taking of property without due process. We claimed that this preconfiscation affected the Petitioners' Sixth Amendment rights to counsel of their choice as a result of this taking without due process. Most importantly, in same IRP,

this litigant advanced that his intention was to appeal this second railroading of 98-2225 (RLA).

While appeal 05-1775 was supposedly sub judice, the Petitioners found new exonerating evidence that they included in a timely filed FRCP Rule 60 B Motion. Same evidence constituted of:

1. That the applicable and controlling law, the Higher Education Act (HEA), specifically, and explicitly proscribed the application of the clock hour regulation to the year for which it was ultra vires upheld by the OIG in its pseudo-audit, due to the effect of the delay on its publication. [5]

2. The production of evidence of smoking gun quality that proved without a doubt that all the 512 fraudulently imputed cases of alleged "unpaid refunds" had been paid, when and how.

Based on this new evidence, the Petitioners timely filed through this legal counsel, their FRCP Rule 60 B Motion, which is available by law for anyone under these particular circumstances to file for a new trial.

The USDCDPR did not consider it at all. It limited itself to rule that: "This case is under appeal." In so doing, the USDCDPR ruled contrary to the applicable law that prescribe that FRCP 60(b) motions are to be given independent consideration

[5] See HEA, 20 U.S.C. 1070, section 482, Master Calendar.

from any other previous consideration under the court's evaluation to the point that they can be considered as a distinct cause of action and as such they can be even filed as a totally independent cause of action. See FRCP 60 (b).

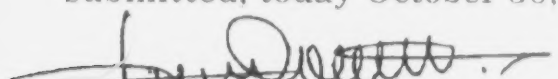
That unattended FRCP Rule 60 B Motion was what led to the 06-1562 appeal which then the USCA1C denied without more, again contrary to the beyond doubt exonerating evidence that proved that the clock hour "finding" was based on a regulation whose application was proscribed by law and the smoking gun exonerating evidence proving that the fraudulently imputed unpaid refunds were paid.

For the above stated reasons, the Honorable Justices of this Court have before you a formidable opportunity to establish policy and rule that whatever determinations of law are made regarding a controversy and its appeal(s), are not necessarily binding or have to be deemed waived in a different and distinct FRCP 60 b motion claims, most especially in terms of the standing to claim.

The third reason why the members of this Court should grant this petition for rehearing and grant the certiorari is that you have the opportunity here to make clear the legal effects of courts allowing a lay person, non-lawyer, to appear for a corporation. See Grace v. Bank of Leumi, 04-5824 (2nd.Cir. 2006), Rowland v. California Men's Colony, 113 S. Ct. 716 (1993).

CONCLUSION

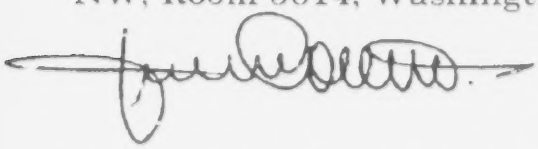
For all the above stated reasons, this Petition for Rehearing should be granted. Respectfully submitted, today October 30, 2009.



JULIO MORILLO LIMARDO, ESQ.
AVENIDA BETANCES I-17
HERMANAS DAVILA
BAYAMON, P.R. 00959.
787-485-5437

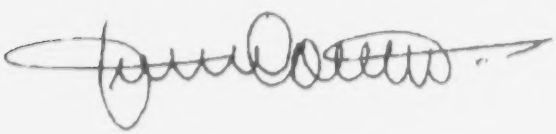
CERTIFICATE OF SERVICE

I, Julio Morillo Limardo, Esq., hereby certify that on this same date above I have sent a copy of this Petition to the Solicitor General of the U.S., at the U.S. Department of Justice, 950 Pennsylvania Ave., NW, Room 5614, Washington, D.C. 20530-0001.



CERTIFICATE OF COUNSEL

I, Julio Morillo Limardo, Esq., hereby certify that this Petition for Rehearing is restricted to circumstances of a substantial effect not previously presented and that it is presented in good faith and not for delay.



program. The program review cited IEU for having a history of making late refunds to students and to the Pell Grant account. The program reviewers discovered that the cause of most of the late refunds was IEU's admission that its usual practice was to wait until the September following each award year to make refund payments: its method for effecting this refund was to offset the refund against future draw downs from the Pell Grant Statement of Account. As a result. IEU's eligibility for funds would be reduced by the amount of the offset .Based on this finding of late refunds, the program reviewers asked IEU to prepare a report of refunds not made. or made late, to the Pell Grant account for each award year under review. In compliance with this request. IEU compiled an initial list of late or unpaid refunds which disclosed 803 late refunds. totaling 5971,9I4, for the 1992-93 award year: 865 late refunds, totaling S 1,044,454, for the 1993-94 award year; and, as of the time of the review. IEU had failed to make 512 refunds. totaling S655,554, for the 1994-95 award year. Ali refunds for the 1992-93 and 1993-94 award years had been paid at the time of the program review.

In response to the SFAP claim that [EU owed the Pell Grant account refunds of S655,554 for the 1994-95 award year, the school produced testimony and documents proving that on July 20, 1995, it reduced its authorization for Pell Grant funds by generating an offset of S1,120,192 to its Pell Grant account. IEU argues that this transaction represents a refund, albeit late, of more than double the amount SFAP requested. SFAP disagrees with IEU's conclusion. SFAP confirms that an offset is an appropriate method of paying a refund. but that a reduction of the authorization in a school's Pell Grant statement of account can occur for other reasons as well, such as a reduction in the number of enrolled students. SFAP insists, and I agree, that in this situation a valid refund would have been effectuated only if the reduction of IEU's authorization - was accompanied by a showing that IEU enrolled additional students who were eligible for Pell

Grants, but for which IEU did not draw down federal funds to award than those grants. IEU presented no evidence of its forbearance of the award of additional Pell Grants to match the offset of its authorizations, therefore,

I must conclude that the refund for the award year for 1994- 95 has not been consummated.

Discussion as to Termination

The Secretary has been given the statutory authority to terminate the eligibility for any program under Title IV. of an otherwise eligible institution, if it fails to carry out any regulation prescribed by the Secretary. 20 U.S.C. § 1094{0(1)(D). Pursuant to this authority, the Secretary has promulgated 34 C.F.R. § 668.86(a). which provides that the Secretary may terminate the eligibility of an institution to participate in any or all Title IV programs if the institution violates any provision of Tide IV or any regulation or agreement implementing that Title. In addition, if an institution's regulatory violations result in a breach of its fiduciarv duty to administer Tide IV programs in accordance with the highest standard of care and diligence, this conduct also constitutes grounds for termination of eligibility to participate in these programs. 34 C.F.R. § 668.82(c).

During the award years under consideration, IEU consistently engaged in conduct which was contrary to the Title IV regulations and regularly ignored policy guidance regarding its obligation to properly estimate the amount of Federal funds needed for a three day period of operation. thus allowing it to maintain excess Federal funds in its school account in violation of regulatory prohibitions designed to prevent this situation. Additionally, IEU failed to make timely refunds, and for the 1994-95 award year failed to make refunds at all, to students and/or the Pell Grant account for students who withdrew, dropped out, or were expelled from

the institution: Based upon the credible evidence of these regulatory violations.

SFAP has shown to my satisfaction that IEU lacks the administrative capability to administer Title IV programs and that it has also failed to act in a manner consistent with its fiduciary duty. I find IEU's failure of its duties in these two critical areas warrants termination of its eligibility to participate in the Title IV programs. 7

ASSESSMENT OF FINES

In conjunction with its efforts to terminate IEU's eligibility to participate in Title IV programs. SFAP also proposes to fine IEU $275,000, arguing that the violations described above were volitional repetitive and of a most serious nature. The Secretary has the authority to impose a fine on an institution of up to 525.000 for each violation of a statutory or regulator/ provision. 34 C.F.R. § 668.84(a). In assessing this fine. the gravity of the violations should be considered. as well as the size of the school. 34 C.F.R. § 668.92(a). The seriousness of the violations will be addressed below, and I find this is not a small school.

[7] *In re Allied Schools of Puerto Rico.* Dkt No. 94-125-ST, U.S. Dep't of Education (Mar. 23. 1995), aff'd by the Secretary Sept. 18. 1995).

For IEU improperly requesting more fund than it needed for immediate disbursement. SFAP seeks a fine of $75,000. This amount is based on a fine of $25,000 for each of the three award years of the violations. 8 The gravity of IEU's retention of these excess Federal funds throughout the three year period warrants approval of $75.000, the maximum amount of this fine. In conjunction with the excess cash situation.

SFAP also seeks a fine of $75,000 for using the excess Federal funds for unauthorized purposes over the period of the three award years. SFAP did not prove this allegation, so no fine is appropriate for this finding.

SFAP is seeking a fine of $25,000 for IEU's overstatement of clock hours of instruction for award year 1993-94 and an additional S25.000 for the award of excess Pell Grant funds to its students as a result of overstating these same clock hours. Having found the overstatement of clock hours of instruction is significantly less than advocated by SFAP. no fine is appropriate for this finding.

For failure to make refunds and failure to make timely refunds, SFAP seeks a fine of $75,000, based on $25,000 for each award year´s violations. Once again, treating all late refunds occurring in each award year as one separate violation, I find that a fin of $25,000 for each year for a total fine for this finding of S75.000 is appropriate. considering the disregard shown by IEU for regulations requiring a more timely payment of refunds.

8 SFAP treats the excess cash violations occurring in an award year as one violation, rather than attempting to find a violation for each excess cash incident or occurrence.

In conclusion. I find that a total fine of S150.000 for IEU's misconduct is appropriate.

ASSESSMENT OF PROGRAM LIABILITIES

In addition to the termination proceeding initiated under 34 C.F.R. Part 668, Subpart G. this hearing also addressed SFAP's efforts to assess liabilities against IEU pursuant to 34 C.F.R. *Part 668.* Subpart H. based on a final program review determination issued on June 1 1996, and a final audit determination issued on June 28, 1996. This assessment of liabilities relates to the same determinations as were made in the termination proceeding, that is. IEU's maintaining excess cash, failure to make Federal Pell Grant refunds and failure to make refunds in a timely manner, overstating clock hours of instruction, and, although not included in the Subpart G proceeding, IEU's failure to accurately verify information submitted by one student.

For IEU's consistent maintenance of excess cash during the three award years. SFAP has assessed a liability of S756,864. This amount represents S213,917 for the imputed interest on these excess funds which were held by IEU in its account rather than returning them to the Federal account upon the realization that it had in excess of three days need. It also includes S542.947 which represents the amount of excess cash remaining in IEU's Federal account at the conclusion of the three year Program review period. I find that IEU must reimburse SFAP for both amounts.

Although I have found that did not overstate its clock hours for the students in the day program for the 1993'94 award year, there is an overstatement of one-third of a clock hour per day for the students enrolled in its night program. IEU must recalculate the Pell Grant awards for the night students and

reimburse SFAP for any resulting over awards. Additionally IEU must recalculate the number of clock hours for bath programs for the 1994-95 award year, using the same formula as used for the 1993-94 award year, and then recalculate the Pell Grant awards accordingly. IEU must reimburse SFAP for any resulting 1994-95 over awards.

I have confirmed SFAP's finding that IEU made 1,668 late refunds for the 1992-93 and 1993-94 award year and the total dollar value of these late refunds of S2,016,368. For these late refunds. SFAP is entitled to recover the interest on those late refunds at a rate of 3 percent per year. SFAP has computed this as $15.544 for 992-93 and S18.427 for 1993-94. Additionally, I agree *with* SFAP's assertion that it is entitled to a refund from IEU of $655.554 which was due for the 1994-95 award year, along with interest of S23.561.

During the 1995 program review, it was discovered that IEU failed to conduct verification of information submitted by student number 27. IEU has not submitted satisfactory evidence to rebut this finding; therefore, it must repay SFAP the $2300 in Title IV funds paid to that student

FINDINGS

1. IEU consistently maintained program finals in recess of its needs and must reimburse the Department $756,864 for those excess funds and their costs.

2. IEU did not overstate the number of clock hours in its day program for the 1993-94 award year. It must recalculate the Pell Grant award for its 1993-94 night program, as well as both programs for the 1994-95 award year, and reimburse the Department for the over awards in Federal Pell Grant funds.

3. IEU failed to make timely refunds to the Pell

Grant program for the 1992-93, 1993-94, and 1994-95 award years and must reimburse the Department 562,532 in imputed interest costs of those late refunds. Further. IEU must reimburse the Department S655,554 for its failure to make a retired payment for the 1994-95 award year.

4. IEU must reimburse the Department S2.300 for its failure to verify the excess funds for student number 27.

ORDER

On the basis of the foregoing, it is hereby ORDERED that the eligibility of Instituto de Educacion Universal to participate in the student financial assistance programs authorized under Title IV of the Higher Education Act of 1965 be terminated: that it pay a fine of $150,000: and that it reimburse the Department $1,477,230.

Richard F. O'Hair

Judge Richard F. O'Hair

Dated: January 24, 1997

(iii) Order on rehearing

First Circuit's Order of August 5, 2008 denying and striking "Motion For Conversion of the Motion Requesting Court To Clarify Its Order Into A Motion For Panel Rehearing and/or Rehearing En Banc".

United States Court of Appeals
For the First Circuit

No. 06-1562

ANGEL RUIZ-RIVERA, ET AL.,

Plaintiffs, Appellants,

v.

U.S. DEPARTMENT OF EDUCATION, ET AL.,

Defendants, Appellees.

Before

Lynch, Chief Judge,
Torruella and Selya, Circuit Judges.

ORDER OF COURT

Entered: August 5, 2008

Currently pending in the above-numbered appeal are (1) the motion of Angel Ruiz-Rivera asking that this court clarify its order of April 30, 2008 denying his motion reconsideration and (2) a request that we convert the motion for clarification into a motion for rehearing and for a stay of mandate. However, and as noted before, since appellant is not a proper party to this appeal, these motions must be stricken.

So ordered.

By the Court:

/s/ Richard Cushing Donovan, Clerk.

First Circuit's Order of October 10, 2007 denying and striking petition of Co-Plaintiff, and signatory of the Notice of Appeal, Ruiz Rivera, for rehearing and rehearing en banc and for disqualification

United States Court of Appeals For the First Circuit

No. 06-1562

ANGEL RUIZ-RIVERA, ET AL.,

Plaintiffs, Appellants,

v.

U.S. DEPARTMENT OF EDUCATION, ET AL.,
Defendants, Appellees.

ORDER OF COURT

Entered: October 10, 2007

Currently pending in the above-numbered appeal are (1) the petition of Angel Ruiz-Rivera, appearing pro se, for rehearing and rehearing en banc, and (2) Ruiz-Rivera's motion, also filed pro se, to disqualify this court from considering any matters. concerning Ruiz-Rivera or Instituto de Educacion Universal (IEU). Ruiz-Rivera, however, was dismissed as party to this appeal on November 9, 2006, and the pending petition and motion do not raise any challenges to this dismissal. Moreover, since a lay person may only represent himself, Ruiz-Rivera cannot file any;petitions or motions on behalf of IEU. We therefore have no basis upon which to rule on either matter, and we therefore order both the petition and the motion stricken.

By the Court:

(iv) Judgment sought to be reviewed

First Circuit's Judgment of May 11, 2007 Summarily affirming the district court's denial of its motion for relief of judgment, filed under Fed. R. Civ. P 60(b).

United States Court of Appeals
For the First Circuit

No. 06-1562

INSTITUTO DE EDUCACION UNIVERSAL,

Plaintiff, Appellant,

ANGEL RUIZ-RIVERA,

Plaintiff,

v.

U.S. DEPARTMENT OF EDUCATION, ET AL.,

Defendants, Appellees.

Before

Torruella, Circuit Judge,
Selya, Senior Circuit Judge,
and Lynch, Circuit Judge.

JUDGMENT

Entered: May 11, 2007

Appellant Instituto de Educacion Universal (IEU) appeals from the district court's denial of its motion for relief from judgment, filed under Fed. R. Civ. P. 60(b). After carefully considering the parties' briefs and the record, we can see no error in this ruling. First, and even assuming that the district court never considered the motion's merits, the motion would have had to have been denied since it merely rehashed the issues that the court already had resolved. See United States v. One Rural Lot No. 10,356,

238 F.3d 76, 78 (1st Cir. 2001) (per curiam) ("A motion for relief from judgment cannot be used merely to reargue a point already decided") (internal quotation marks and citation omitted). Second, all of IEU's appellate arguments concerning why Rule 60(b) relief was warranted are, in reality, aimed at the merits of the petition for review. It therefore is plain that IEU is attempting to use this pending appeal as "a surrogate for a seasonable appeal of the underlying judgment." See Karak v. Bursaw Oil Corp., 288 F.3d 15, 19 (1st Cir. 2002). Appellant cannot do this. Id.

Summarily affirmed. See Local Rule 27.0(c).

By the Court:

Richard Custting Donovan, Clerk.

(v) Material required by 1(f),(g)

(vi) Other material the petitioner believes essential to understand the petition

Exhibits of Appendix VI

VI-1 Letters from USDE Compliance and Enforcement Director and U.S. attorney certifying IEU had not lost its eligibility.

VI-2 Collection notices by the USDE and the IRS.

VI-3 Pertinent excerpts of Ruiz Rivera's November 8, 2004 Injunctive Relief Petition where he advanced that the Plaintiffs intended to appeal if injunction was not granted.

VI-4 Higher Education Act (HEA) of 1965 as amended clause which was introduced with the FRCP 60 b Motion and that expressly proscribed the application of the regulation for the year upon which the clock hour "finding" was upheld.

VI-1. Letters from USDE Compliance and Enforcement Director and U.S. attorney certifying IEU had not lost its eligibility.

UNITED STATES DEPARTMENT OF

WASHINTON. D.C. 20202-

MAY 30
1997

Ms. Lori Marty
Great Lakes Higher Education Corporation 2401
International Lane
Madison, WI 53704-3192

Re: Instituto de Educacion Universal,

Puerto Rico - OPE: 02316400 Dear Ms.

Marty:

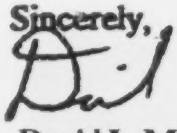
On February 19, 1997, this office faxed you a copy of the initial administrative decision in the matter of Instituto de Educacion Universal, Puerto Rico (IEU) and the U.S. Departinent of Education (Docket Nos. 96-28-ST, 96-93-SP, and 96-103-SA). The cover letter indicated that both parties planned to appeal the decision.

Please be advised that on April 4, 1997, Student Financial Assistance Programs (SFAP) appealed the decision to the Secretary of the U.S. Department of Education (Secretary). IEU appealed the decision to the. Secretary on February 28, 1997. Although the initial decision was to terminate IEU from participating in the Title IV programs, during the appeal process, the school remains eligible to

participate in these programs. 34 C.F.R. § 668.90.

If you have any further questions, please contact Amy Freireich at (202)-708-6046.

Sincerely,



David L. Morga
Director
Administrative

U.S. Department of Justice

GUILLERMO GIL
United States Attorney's Office
District of Puerto Rico

June 2, 1997

VIA FACSIMILE AND REGULAR MAIL

Benny Frankie Cerezo, Esq.
848 Hostos Avenue
Hyde Park
Rio Piedras, Puerto Rico 00927-4216

Re: Josefina Quinones Garcia v.
United States Civil No. 97-1722 (HL)

Dear Mr. Cerezo:

Enclosed find copy of the letters the Department of Education sent to Great Lakes Higher Education Corporation and United Student Aid Funds (USAF). These letters show that the Injunction you filed on behalf of Josefina Quinones is premature since I.E.0 has not lost its eligibility in Title IV programs.

The government will not oppose to a voluntary dismissal of the Injunction.

Please advise within the next five (5) days, if you will voluntary dismiss the complaint, if not the defendant will then file a Motion to Dismiss.

Cordially,

GUILLERMO GIL
United States Attorney

S Isabel Munoz Acosta
Assistant U.S. Attorney

VI-2. Collection notices by the USDE and the IRS.

DEPARTMENT OF TREASURY
FINANCIAL MANAGEMENT SERVICE
BIRMINGHAM, AL 35283-0794

December 22. 1998

Financial Officer. Instituto De Educacion Universal
Mr. Angel Rivera, President
404 Avenida Barbosa
Hato Rey, PR 00917

DMSC Account Number: 990011062-121626

Dear Financial Officer:

This is to advise you that your unpaid delinquent debt owed to the Department of Education has been referred to the U.S. Department of the Treasury for collection. According to the Department of Education's records, you owe $20,911,099.98 to the United States Government.

Aggressive legal collection action will commence against you unless you make payment in the amount of $25,540,968.50, which includes all administrative fees and applicable interest, within ten (10) days of the date of this letter.

If you wish to avoid the pending collection measures being prepared to collect your debt, you must immediately send your check or money order, made payable to the U.S. Treasury. To ensure proper credit to your account, include the account number in the memo section of your check, and forward the check with the enclosed PAYMENT COUPON to:

U.S. Department of the Treasury — FMS Debt Management Services
P.O. Box 105576

osure

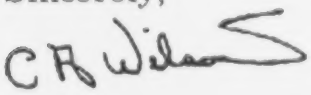
Atlanta, GA 30348

Correspondence should be directed to:

Debt Management
Servicing Center (TRFM)
Post Office Box 830794
Birmingham, AL 35283-0794

If you are unable to pay your debt in full, please contact Sharon Carter at (888) 826-3127 immediately.

Sincerely,



Charles A. Wilson
Debt Management Services

VI-3. Pertinent excerpts of Ruiz Rivera's November 8, 2004 Injunctive Relief Petition where he advanced that the Plaintiffs intended to appeal if injunction was not granted.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO I

INSTITUTO DE EDUCACION UNIVERSAL

V. 98'2225RLA

U.S. DEPARTMENT OF EDUCATION

INJUNCTIVE RELIEF PETITION

To the Honorable Court (HC):

Comes now the Plaintiffs', Angel Ruiz Rivera (ARR), appearing here on his own right (Pro Se); In Forma Pauperis (IFP), and in representation of IEU, 1 the defunct since 1998 legal fiction and respectfully states, alleges and prays as follows:

I. Introduction

1. Recently, on October 26, 2004, this HC issued a summary judgment order and opinion in the above referenced case after having been filed more than six (6) years ago.

2. Most recently, the appearing counsel for the Plaintiffs has moved to resign due primarily to the Plaintiffs incapacity to pay the legal firm the tens of thousands of dollars in honoraria owed, due to our IFP economic status.

Pursuant to the authority of the previous cases where ARR has temporarily represented IEU while *he retains counsel for* the defunct legal fiction. See 99-1328 and 99-1628. According to the rationale of the First Circuit in allowing my representation temporarily by way of exception, this appearance of an officer in representation of an entity is accepted in circumstances such as this where there is too *short time* to *file a motion for reconsideration* under Federal Rule of Civil Procedure 59. (10 days) and this coincides with the resignation of the preexisting legal

representation.

...

...

...

...

...

possibility of being able to retain and pay counsel to defend itself from all *these* clearly unripe unconstitutional and illegal actions since it left it totally devoid of economic resources. This is one of the reasons why IEU has been obliged to appear through its President, Pro Se, in various stages of this litigation since the onset, starting at the administrative hearings level.

7) Actually, because as we all know, the decision of this court is still not final, and we

intend to appeal it if this injunctive relief petition is not granted, we are respectfully requesting from this HC to order from the USDE the immediate release of all the pre-confiscated funds so that IEU can have economic resources to avail itself of its right to representation by counsel of its choice, a right that was preconfiscated from it by the USDE by the taking of all its property without evidently complying with basic due process. We request that from these funds, the debt owed to the previous lawyers that have represented IEU in this litigation are paid, just as the present and future ones, until this judicial review process is final and over, including any future counsel that this HC may choose to appoint for IEU due to its insolvency and the determination of this HC that its President, Angel Ruiz *Rivera* (ARR) cannot *represent* it Pro Se. This, in case my appearance for IEU is not accepted or if I die for whatever reasons. In the alternative, we pray that this HC appoints a judicial administrator of these funds who would pay the legal honoraria, fees and costs

and any other incidental cost of the rest of this litigation including appeal and any other expenditure that this HC may in time approve.

8) Very respectfully, we are also requesting that this HC orders the USDE to comply with the Notice of Levy of June 17, 1998, timely filed by the Internal Revenue Service (IRS) of the U.S. Department of the Treasury (USDT) against the USDE funds owed to IEU (Exhibit 5), since this credit of the IRS has preference in rank and in time over any credit that the USDE may

VI-4. Higher Education Act (HEA) of 1965 as amended clause which was introduced with the FRCP 60 b Motion and that expressly proscribed the application of the regulation for the year upon which the clock hour "finding" was upheld.

(B) by March 1: proposed modifications and updates pursuant to section 478 published in the Federal Register;
(C) by June L final modifications and updates pursuant to section 478 published in the Federal Register;
(D) by August 15: application for Federal student assistance and multiple data entry data elements and instructions approved;
(E) by August 30: final approved forms delivered to servicers and printers;
(F) by October 1: Federal and multiple data entry forms and instructions printed; and
(G) by November 1: Federal and multiple data entry forms, instructions, and training materials distributed.
(2) Allocations of campus-based and Pell Grant funds—
(A) by August 1: distribution of institutional application for campus-based funds (FISAP) to institutions;
(B) by October 1: final date for submission of FISAP by institutions to the Department;
(C) by November 15: edited FISAP and computer printout received by institutions;
(D) by December 1: appeals procedures received by institutions;
(E) by December 15: edits returned by institutions to the Department;
(F) by February 1: tentative award levels received by institutions and final Pell Grant schedule;
(G) by February 15: closing date for receipt of institutional appeals by the Department;
(H) by March 1: appeals process completed;
(I) by April 1: final award notifications sent to institutions; and

(J) by June 1: Pell Grant authorization levels sent to institutions.

(b) TIMING FOR REALLOCATIONS—With respect to any funds re- allocated under section 413D (e), 442(e), or 482(j), the Secretary shall reallocate such funds at any time during the course of the year that will best meet the purpose of the programs under subpart 3 of part A, part C, and part E, respectively. However, such reallocation shall occur at least once each year, not later than September 30 of that year.

(c) DELAY OF EFFECTIVE DATE OF LATE PUBLICATIONS.-**Any regulatory changes initiated by the Secretary affecting the programs pursuant to this title that have not been published in final form by December 1 prior to the start of the award year shall not become effective until the beginning of the second award year after such December 1 date.** For award year 1994-95, this subsection shall not require a delay in the effectiveness of regulatory changes affecting parts B, G, and H of this title that are published in final form by May 1, 1994.

(d) NOTICE TO CONGRESS. --- The Secretary shall notify the Committee on Labor and Human Resources of the Senate and the Committee on Education and Labor I of the House of Representatives when the items specified in the calendar have been completed and provide all relevant forms, rules, and instructions with such notice.

NO. 08A883

IN THE SUPREME COURT OF THE UNITED

STATES

ANGEL RUIZ RIVERA AND
INSTITUTO DE EDUCACION UNIVERSAL
PETITIONERS

V.

UNITED STATES DEPARTMENT OF
EDUCATION
RESPONDENT

PROOF OF SERVICE

I Julio C. Morillo, Esq. do declare that on this date, July 6, 2009, as required by Supreme Court Rule 29 I have served a copy of the enclosed Petition For Writ of Certiorari on; Office of the Solicitor General of the U.S. Room 5614, Department of Justice, 10th Street and Constitution Avenue N.W. Washington, DC 20530 by depositing an envelope containing the above documents in the United States Mail properly addressed and with first-class postage prepaid .

Julio Morillo Limardo, Esq.
U.S.D.C. D.P.R. #130811
U.S.C.A. 1.C. #82774
Avenida Betances I-17
Hermanas Davila,
Bayamon, P.R.00959.
(787)485-5437